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JAN 27 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1956

No. 644

SYLVANIA ELECTRIC PRODUCTS, INC.,
Petitioner,

v.

IRENE BARKER, EXECUTRIX,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

THOMAS H. MAHONY,
10 State Street
Boston 8, Massachusetts
Attorney for Petitioner

JOSEPH G. BRYER
EDWARD F. MAHONY
GEORGE T. PADULA
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

Sylvania Electric Products, Inc. prays that a Writ of Certiorari issue to review the decision and judgment of the Circuit Court of Appeals for the First Circuit, entered in the above case or cases on December 20, 1955.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit (App. A, 19), #4992 and #4993 1st Cir. December 20, 1955 is set forth in Appendix A.

NOTE: Joint Record Appendix and Proceedings are cited herein as JRA.

Jurisdiction

The order of the Circuit Court of Appeals affirming the judgments of the District Court was entered on December 20, 1955. Upon application of the petitioner, the Circuit Court of Appeals on January 4, 1956 ordered a stay of the mandate until further order of that Court and set February 10, 1956 for the filing of the within petition in this Court. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code Annotated.

Questions Presented

1. Can an alleged common law tort feasor manufacturer of fluorescent glass tubes be charged with knowledge as of early 1946 that the chemical element beryllium with which element the tubes were lined, might, by inhalation, produce a progressively fatal disease of the lungs known as berylliosis in a person working on such tubes when no such disease was known, no such dangerous characteristic was suspected, and there was no such common knowledge and no such information in the possession of physicians, chemists or other scientists prior to late 1947, so as to fix liability upon it for negligent failure to warn of such danger?

2. Can the statute of limitations relating to Employers Liability cases under the Workmen's Compensation Statute of a state where an injury occurs be applied to a personal injury case based upon common law negligence of that same state in a trial at common law between a citizen of that state and a defendant of a different state in the United States District Court sitting in the latter state whose statute of limitations covering common law actions is entirely different?

3. Can a plaintiff suffering personal injuries be permitted by perjuring himself successfully to deceive and defraud one of two courts, for the purpose of obtaining

money and by false statements under oath diametrically opposed in the two instances profit materially and financially therefrom in both courts?

4. Can a jury be permitted to consider opinion evidence from an actuary as to the life expectancy of a person of the decedent's age at death and the capitalization of the alleged gross earning capacity of the decedent during that life expectancy, where the actuary admits that neither the life expectancy given nor the earning capacity assumed would apply to the decedent because he had been bedridden and progressively deteriorating in health for some years prior to the date and age used as the basis for the opinion and during the same period of years prior to death had no earning capacity whatever?

Statutes Involved

The statutes involved are set forth in Appendix B.

Statement

The Proceedings in the District Court

The two actions at law arise out of the same facts. The first action (No. 4992) was begun in 1950 by Rexford L. Barker for a tortious personal injury allegedly due to the inhalation of beryllium while blowing into beryllium coated fluorescent glass tubing manufactured by the defendant and bought by the deceased's employer in Omaha, Nebraska, in 1946, and allegedly causing a berylliosis or pulmonary granulomatosis (JRA, 9-13). The second action (No. 4993) was begun in 1954 for the tortious death of Rexford L. Barker, allegedly resulting in 1954 from the said berylliosis (JRA 24-28). Both actions were consolidated for trial by order of the court (JRA 41).

The evidence was by way of oral testimony, depositions and exhibits. Barker began blowing such beryllium coated tubing as early as 1931 (JRA 66, 73, 81, 111). After a

tube was heated he would blow into one end of it and bend it into the shape of letters for neon signs (JRA, 45-46). In 1941 he, himself, coated the inside of plain glass tubes with similar fluorescent powders (JRA, 77, 111). The fluorescent powders so used by Barker in coating tubes and the powders with which the tubes of other manufacturers were coated prior to 1946 contained beryllium (JRA, 109, 111). From 1939 to 1944 such beryllium coated tubing, blown by Barker, was supplied by at least five manufacturers other than the defendant and none by the defendant (JRA 68-75, 77, 109, 115-117, 123-124).

As early as 1941 Barker was exposed to beryllium (JRA, 173) and as early as 1943 evidenced symptoms of berylliosis in that he quickly became short of breath on exertion and easily fatigued (JRA, 164-165). In 1948 Barker consulted several physicians, among whom was Dr. F. L. Dunn of Omaha, Nebraska, who finally, after several weeks and several other diagnoses, diagnosed the condition as berylliosis due to inhalation of beryllium or beryllium oxide (JRA, 141, 146).

For a few weeks in early 1944, Barker's employer bought and used some 4200 feet of the defendant's tubing during a period when his employer's exclusive manufacturer and supplier (General Electric Company) was troubled by a strike (JRA, 76, 79). Other than that short period, General Electric Company furnished all the coated tubing used by Barker from early 1944 to 1948 when he quit work—some 45,000 to 50,000 feet of tubing (JRA, 119, 122).

In 1948 or 1949 Barker brought action under the Nebraska Workmen's Compensation Act (JRA, 61-63), to recover for his total disability from berylliosis, against his employer in the Nebraska Court, having jurisdiction thereof. In November, 1949, Barker filed a petition in that Court for permission to compromise or settle said claim for total disability in a lump sum, which petition

was signed and sworn to by him (JRA, 61-63; Ex. A, JRA, 258-270). In the said petition, Barker swore that he had contracted berylliosis in the course of his employment from exposure to fluorescent powders containing beryllium (par. I, II, III of Ex. A, JRA, 258-270) and further averred that "his exposure to said occupational disease was at least 40% contracted and incurred during a period prior to the time when the Occupational Disease Statute of Nebraska became effective (agreed upon by counsel as August 1943), and that at least 40% of his disability and medical expenses are not covered by said Statute, and that defendants (employer and insurer) are therefore not liable for at least 40% of the full benefits scheduled in said Statute" (par. III of Ex. A, JRA 259). The Nebraska Court, on December 7, 1949, entered its decree upon said petition basing it upon specific findings of fact, identical with or substantially identical with the said sworn statement of Barker (Ex. B, par. 3, JRA, 270-281). The Court also found as a fact that Barker was "fully informed in the premises and is acting solely upon his own information and upon the advice of his own counsel after extended and exhaustive consideration of the entire matter, and is not acting upon any representations of the defendants or any of their representatives" (par. XXI of Ex. B, JRA, 270-281). The Nebraska Court thereupon entered the said decree granting Barker's petition against his employer and the employer's compensation insurance carrier, for the cash payment of $3,750.00 and certain obligations as to future payments (Ex. B; JRA, 280-281).

Thereafter Barker made claim against General Electric Company for the same permanent total disability claiming that its coated tubing was the cause or a cause of his disability. In May 1950, Barker executed a release of all liability to General Electric Company for $17,500.00

(JRA, 86-90; Ex. C., JRA, 281-283). This release, while in some respects resembling a covenant not to sue, appears to be a general release for the disability due to berylliosis or a complete satisfaction therefor. It recited that General Electric Company furnished Barker's employer with its products (coated tubes) from July 11, 1944 to August 20, 1949, that Barker claimed "to have sustained injuries and to have become permanently disabled by reason of contacts and use, in his occupation, of products" of that company, that Barker desired to settle such claims as he had against that Company "and for all damages that he may sustain or his estate may sustain or the dependents or next-of-kin . . . may sustain in the event of his death, as a result of said claimed injuries." He further released that company for all "damages . . . on account of injuries . . . resulting from damage and injury claimed to have been sustained . . . as hereinbefore set forth . . ." Barker sought therein to limit the scope of the instrument to General Electric Company (Ex. C, JRA, 281-283). Similarly worded releases were simultaneously signed by Irene L. Barker, individually and as wife of Rexford L. Barker, in the sum of $2,000.00 (Ex. D, JRA, 283-285) and by Irene L. Barker, as Guardian of their minor son, James R. Barker, in the sum of $500.00 (Ex. E, JRA, 286-288).

Upon chemical analysis, made in 1951, of one of the defendant's tubes furnished in 1946, but not a tube used by Barker, it appeared that there was but 87/100 of 1% (0.0087) of beryllium in the coating of the tube (JRA, 128-129).

Dr. F. L. Dunn, over objection, testified that R. L. Barker was substantially bedridden from September 1948 and died as a result of heart failure or lung failure on September 12, 1952 (JRA, 150). At no time did he express the opinion nor was there any other evidence that the de-

fendant's tubes were an adequate cause for the berylliosis or that any particular amount of beryllium or of tubing with 0.0087 beryllium was adequate (JRA 145, 156, 157, 160-162, 164).

Dr. F. L. Dunn also testified, that in 1948 Barker told him that he could not mow the lawn in 1943 as well as in 1942 and that he found himself short of breath; that in his opinion shortness of breath and fatigue were symptomatic of berylliosis at that time (JRA 165); that once beryllium crystals got into the lungs they remained there and that berylliosis developed progressively thereafter (JRA 162, 166), the objective symptoms possibly not appearing for several years thereafter (JRA, 166-167); that Barker told him that he himself coated fluorescent tubes in 1941 (and had been exposed to inhalation of beryllium from 1941 on) (JRA, 173); and that the crystals found in Barker's lungs were not known to be beryllium (JRA, 167-169).

Dr. Dunn further testified without any contradiction that Barker's was the first and apparently the only case of berylliosis in Nebraska up to late 1948, the only one that he knew of anywhere, (JRA, 165-166) and one which took him some 16 weeks so to diagnose (JRA, 140-141, 169-172). There was no testimony that any similar case had occurred anywhere in the world previously.

The trial court, over the defendant's objections (JRA 133-135) permitted an actuary, John Boermeester, called by the plaintiff, to testify in the death case, that a man born on May 24, 1910, (the date of Barker's birth) would, on September 12, 1952 when he died, have a life expectancy of 28.1 years and that the then present value of $6,000.00 (gross annual earnings) as of the date of death for such life expectancy would be $114,534.00. No caution was given to the jury by the court as to these two items as was required under the circumstances.

In cross-examination, he testified that this life expectancy had no reference to Barker, who was a bedridden invalid with a serious, progressive and fatal disease of some four years prior to his death (JRA, 136-137) and that the capitalized assumed earnings had no applicability, because for the same four years prior to his death Barker had been totally incapacitated to earn anything (JRA, 197).

Motion was made to strike this evidence unsuccessfully (JRA 211).

The defendant, except for the introduction of Exhibits A, B, C, and D, rested at the conclusion of the plaintiff's evidence (JRA, 198, 211) and duly moved in writing in each case for a directed verdict in its favor, which motions were denied subject to its exceptions (JRA, 241-244).

The jury returned a verdict for the plaintiff upon the personal injury action for $30,498.00 and in the death action for $61,750.00 (JRA, 250).

Thereafter, the defendant duly filed a motion in each case for the entry of judgment n.o.v. and for a new trial under Rule 50 (b) which motions were also denied (JRA, 251-253).

The Proceedings in the Circuit Court of Appeals

The cases presented upon appeal to the Circuit Court of Appeals were based upon (1) the denial of the two motions for the direction of verdicts in its favor, (2) the denial of the two motions for judgment for the defendant n.o.v. and for new trial, (3) the admission and failure to strike Boermeester's testimony, and (4) the instructions given to the jury and the failure to give requested instructions.

The Circuit Court of Appeals affirmed the judgments of the District Court.

Reasons for Allowing the Writ

1. The decision of the Circuit Court of Appeals with reference to *ex post facto* knowledge of a conditionally dangerous substance, conflicts with the common law principle of negligence as a cause of action for personal injury in every common law state in the United States and particularly in the United States District Courts heretofore applying such law. If allowed to stand, it will invite in future trials the application of the principle of *ex post facto* responsibility and the principle of *nunc pro tunc* knowledge to attribute later acquired information to earlier and non-negligent lack of knowledge. Neither one of these principles should be permitted to be applied to such a case and the decision of the Circuit Court of Appeals ought not to be permitted to stand as a justification therefor.

The Circuit Court of Appeals in substance holds that, admitting there was no evidence whatever of any actual knowledge chargeable to the defendant in early 1946 (App. A, 26), when it made and sold its tubes to the plaintiff's employer, that beryllium oxide if inhaled might produce (what doctors late in 1947 and early 1948 concluded to be and named as) berylliosis, nevertheless, because it was determined by a *post mortem* examination in 1952—for the first time in history, so far as the evidence goes—that beryllium inhaled into the lungs could produce berylliosis —the defendant was presumed to have such knowledge in 1946 (App. A, 27).

Thornhill v. *Carpenter Morton Co.*, (1915) 220 Mass. 593, cited by the Circuit Court of Appeals as authority for this proposition, is, in fact, no such authority. This case dealt with varnish stains containing volatile oil, benzine and petroleum products all of which ingredients were held to be commonly known to be dangerous. So too as to

Farley v. *Tower,* (1930) 271 Mass. 230 also cited. It dealt with pyroxyloid or celluloid, compounds of cellulose and nitric acid or gun cotton also held to be commonly known to be dangerous. *Carter* v. *Yardley & Co. Ltd.,* (1946) 319 Mass. 92 dealt with a manufacturer who, admittedly, did not know all of the ingredients used in the skin lotion which it made and sold. So far as the manufacturer was concerned, he took no steps to see that any known skin poison or irritant was not used.

The case at bar is entirely different. Sylvania Electric Products, Inc. knew that it was using beryllium. It did not know, and had no reason to know that beryllium was inherently dangerous or conditionally dangerous and there was no evidence that any manufacturer of such tubes or anybody else had or should have such knowledge.

The law of Massachusetts applicable to the two cases which was not applied in either court below and which, it is submitted, is the common law doctrine in all states following the common law doctrine of negligence, provides that to be classified as inherently dangerous a substance must be "commonly recognized" or known to be such. In the case of *Lebourdais* v. *Vitrified Wheel Co.,* 194 Mass. 341, the Court in discussing this subject on page 343 said:—

> ". . . where by reason of its nature the article sold is commonly recognized as intrinsically dangerous to life or property, among which gunpowder, nitroglycerine and other highly explosive compounds, naphtha and poisonous drugs are some familiar examples, if the seller without notice of their dangerous or noxious qualities delivers them to a customer or to a carrier who is ignorant of these properties, he is liable not only to him, but to others to whom while in the exercise of reasonable care they are the proximate cause of injury . . ."

This common law doctrine was applied in the only case of berylliosis found by counsel involving such issue—*Harman* v. *Mitcham Works Ltd.*, (1955) Supreme Court of Judicature, Court of Appeal, England, not yet in the reports, but reproduced herein as Appendix C.

The *Harman* case involved a manufacturer of beryllium coated tubes and an employee who contracted berylliosis while making such tubes. It is very similar to the case at bar so far as concerns the issues herein discussed. The court ruled that the chemical element beryllium was not shown to be and was not in fact inherently dangerous; that the defendant manufacturer was not chargeable with knowledge as of July 1947, when it manufactured the tubes in question, by reason of any actual or imputed knowledge or of available information that beryllium was conditionally dangerous when used to coat the inside of fluorescent glass tubes; that such knowledge or information was not available to the industry generally until late in 1947; and that in the absence of such knowledge, at the time of manufacture the defendant manufacturer could not be found to be negligent.

It is submitted that this is the common law principle applicable to the case at bar and that the decision of the Circuit Court of Appeals, in seeking to apply a different rule, violates the precedent established in every common law jurisdiction as well as reason and justice.

The burden of proof of such negligence under the applicable Massachusetts law was upon the plaintiff and there was no burden upon the defendant to disprove negligence. *Peterson* v. *B & M RR*, (1941) 310 Mass. 45; *Smith* v. *Brown*, (1939), 302 Mass. 432; *Copithorn* v. *B & M RR*, (1938), 301 Mass. 510.

The principle of *res ipsa loquitur* does not apply nor does the burden of proof or the burden of going forward with evidence shift to the defendant as suggested by the

Circuit Court of Appeals (App. A, 27). *Foley* v. *Boston Consol. Gas. Co.,* 1955 Mass. Adv. Sh. 499; *Bloom* v. *Warshaw,* 1954 Mass. Adv. Sh. 881; *Walker* v. *Benz Kid Co.,* (1932) 279 Mass. 533. See also *Gauld* v. *John Hancock Mut. Life Ins. Co.,* (1953) 329 Mass. 724; *Howard* v. *Lowell Coca Cola Bottling Co.,* (1948) 322 Mass. 456; *Sturman* v. *Davis,* (1947) 321 Mass. 442; *Deignan* v. *Lubarsky,* (1945) 318 Mass. 661; *Gallo* v. *Leahy,* (1937) 297 Mass. 265.

It is extremely important that the decision of the Circuit Court of Appeals, therefore, be reviewed and the law applicable to the cases brought into conformity with that of all common law jurisdiction throughout the country.

2. The decision in applying the Statute of Limitations of Nebraska (limited to cases under its Workmen's Compensation Statute) to a common law negligence action brought in the United States District Court for the District of Massachusetts violates the principle of Conflict of Laws, not only as applied in Massachusetts but in many if not all of the States, viz.—that the Statute of Limitations of the forum State applies to the issue of seasonability of such an action. This decision ignores or repudiates the law of such States and, unless overruled, will complicate future trials in every court in which an issue of such conflict arises.

Under Conflict of Laws principles generally applied and particularly as applied in Massachusetts the law of the forum or State in which the United States District Court sits controls the trial on procedural matters including the statute of limitations applicable to the cause of action. *Mommand* v. *Universal Film Exch.,* (D.C.-Mass. 43 Fed. Sup. 996; Ibid (CCA 1st, 1948) 172 Fed. 2nd, 37; *Ramsden* v. *Knowles,* (C.C. Mass., 1906) 151 Fed. 718; Ibid (CCA 1st, 1906) 151 Fed. 721, cert. denied 206 U.S. 562.

The Massachusetts Statute, General Laws, Tercen. Ed.,

C. 260, § 2, in force where the complaint was filed therefore, applied to the personal injury case directly and indirectly to the death case. It provided generally that the period of limitation for a negligently caused personal injury action expired six years from the date it accrued (App. B, 38-39).

Section 9 thereof further limited this period by providing that "no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein" (App. B). The Nebraska Statute—Rev. Stats. 1943 Sect. 25.207—in effect during the period involved, limited a cause of action for negligence to four years after the occurrence giving rise to it (App. B, 39).

The Circuit Court of Appeals, erroneously, it is submitted held that the Nebraska Statute of Limitations relating to Statutory Workmen's Compensation applied to the cases at bar. Its decision is likely to prejudicially affect actions tried hereafter in any State other than that in which a cause of action arises. It erred (1) in that it held that General Laws (Ter. Ed.) c. 260 § 9 of the Massachusetts statute incorporated an entire Nebraska Statute of Limitations whereas it merely further limited its own period, (2) in that it held that the Nebraska Statute of Limitations affecting tortious personal injury claims at common law incorporated that of the Nebraska Workmen's Compensation Act applicable only to cases brought thereunder and (3) in that it held that the Massachusetts statute of limitations would be presumed to do likewise (App. A, 23-25).

That § 9 of the Massachusetts Statute was but a further limitation of its own provisions and not an incorporation of other terms of the Nebraska Statute is clear from reading it with General Laws (Ter. Ed.) c. 260 § 2. Under it the cause of action for common law negligence accrues

and the time from which the statute begins to run, is at the time when the first act occurs which sets in motion a series of events which result in the alleged injury. It is immaterial under Massachusetts law whether the effects of that act are known or even anticipated at that time. *Bartlett* v. *Hall,* (1932) 288 Mass. 532; *Maloney* v. *Brackett,* (1931) 275 Mass. 479; *Capucci* v. *Barone,* (1929) 266 Mass. 578. See also as to beryllium exposure *Zimmerman* v. *Gen. El. Co. et al,* (D.C.-Conn.-1954), 126 Fed. Supp. 690.

The Circuit Court of Appeals ruled that the Nebraska Statute of Limitations applicable solely to Workmen's Compensation cases brought thereunder in Nebraska does not begin to run until an employee acquires "knowledge of a compensable disability" (App. A, 25). The case the Court cites as authority therefor—*Dryden* v. *Omaha Steel Works,* (1947) 148 Neb. 1 was a case brought under the Workmen's Compensation Act, as were all the cases similarly cited to that Court by the appellee-plaintiff. The Circuit Court of Appeals thereupon gratuitously assumes that in the absence of evidence to the contrary the same rule would be applied to common law negligence actions in Nebraska (App. A, 27) and applies that principle to the case, and in effect incorporates it into the Massachusetts Statute of Limitations.

There is, however, a vast difference between the philosophy underlying Workmen's Compensation Acts and cases thereunder on the one hand and common law torts on the other. The basic principle underlying Workmen's Compensation Acts is social justice—the obligation of society or a portion thereof—an industry—to care for its employees and to compensate them for disability received in the industry wholly apart from any question of negligence, contributory negligence, assumption of risk, etc. It is proper that under these circumstances and in such

field the discovery of the compensable disease or disability should start the period for limitation for legal action.

The case of *Urie* v. *Thompson*, (1949) 337 U.S. 163 cited by the Circuit Court of Appeals was a Federal Employers Liability Act case which held that "disabling disease" caused in violation of the act was compensable as well as a physical injury.

On the other hand the underlying theory or philosophy of common law negligently caused personal injury is retributive justice—the obligation to compensate for a wrong done to another. The law enforcing such an obligation rightly provides that there must not only be a breach of duty, but—in Massachusetts and Nebraska—the injured party must also be free of contributory negligence and must not have voluntarily assumed the risk of injury.

The decision of the Circuit Court of Appeals in this respect, again, is certain to affect and prejudice many future trials throughout the country unless corrected to conform to the law as generally applied in the various States.

The court also erred, and prejudicially to the same extent in holding that not only would it assume that Nebraska Courts would apply this Workmen's Compensation Law principle to common law torts sued on in Nebraska but that Massachusetts Courts would do likewise.

In Massachusetts the law of Massachusetts is not assumed to be the same as that of Nebraska in the absence of evidence to the contrary, as the Circuit Court of Appeals seems to assert (App. A, 31) but the law of Nebraska is assumed to be the same as that of Massachusetts. *John B. Frey Co. Inc.* v. *Silk Inc.*, (1923) 245 Mass. 534; *Lemieux* v. *B & M RR*, (1914) 219 Mass. 399.

The Massachusetts Courts apply to Workmen's Compensation Law cases substantially the same principle as

Nebraska. *Brophy's* Case, (1951) 327 Mass. 557; *Beausoleil's* Case (1947) 321 Mass. 344; *Crowley's* Case, (1934) 287 Mass. 367; *DeFelippo's* Case, (1933) 284 Mass. 531.

They do not apply this same principle to common law torts. *Bartlett* v. *Hall,* (1934) 288 Mass. 532; *Maloney* v. *Brackett,* (1931) 275 Mass. 479; *Capucci* v. *Barone,* (1929) 266 Mass. 578.

3. The decision which in effect permits a plaintiff litigant, by means of sworn testimony to persuade a Nebraska Court in 1949 to award him Workmen's Compensation for disability by way of occupational disease beginning as early as 1943 and contracted through exposure to beryllium prior to August 1943, and by directly contradictory sworn testimony to persuade a jury in Massachusetts in 1954 to award him damages for a common law personal injury cause of action by repudiation of his sworn statement to the Nebraska Court as false, known to be false and made solely to deceive that Court into awarding him money, establishes a most dangerous principle in the law of torts. It capitalizes dishonesty and fraud upon the courts and ought to be seriously considered by this Court before it is permitted to be adopted and followed generally.

4. The decision permits an actuary's opinion as to the life expectancy of a man of the decedent's age as of the date of his death and a capitalization of an alleged gross earning capacity as of that date for that life expectancy. In so doing it violates the rules heretofore generally applied in the State Courts and United States Courts (1) that such evidence is wholly improper and inadmissible if it is not related specifically to the life expectancy of the decedent, *Wetherbee* v. *Elgin etc. Ry. Co.,* (CCA 7th) 191 Fed. 2nd, 302, 311; *Fritz* v. *Pa. Ry. Co.,* (CCA 7th) 185 Fed. 2nd, 31, 36; *Thompson* v. *Camp,* (CCA 6th) 163 Fed. 2nd, 396, 403; (2) that anticipated benefits to the statutory beneficiaries and not the gross earnings of the

deceased are the criteria of such a capitalization, *Wetherbee* v. *Elgin, Joilet & Eastern Ry.*, (CCA 7th-1951), 191 Fed. 2nd, 302; (3) that the capacity to earn which is assumed must be evidenced by an earning capacity upon the date taken for the capitalization and (4) that the court must caution the jury upon these matters, *Wetherbee* v. *Elgin etc. Ry. Co.*, (CCA 7th) 191 Fed. 2nd, 302, 311; *Fritz* v. *Pa. Ry. Co.*, (CCA 7th) 185 Fed. 2nd, 31, 36; *Thompson* v. *Camp*, (CCA 6th) 163 Fed. 2nd, 396, 403. The decision, ought not, therefore, be permitted to stand.

It is clear that Boermeester's capitalization was upon an improper basis. The charge to the jury confirms this. The court instructed the jury that Barker's earnings amounted to $6,000.00 per year and that "She (plaintiff) is entitled to recover pecuniary losses that resulted from Barker's loss of salary, which you now know was $6,000.00 a year" (JRA, 228-229). Barker deposed that it was $5980.00 before tax deductions (JRA, 65). So too did his wife (JRA, 179).

Conclusion

It is submitted that the questions raised herein are important and require reconsideration to coordinate the principle of common law and conflict of laws in the various State Courts and Federal Courts.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the cases numbered and entitled on its docket nos. 4992 and 4993, *Sylvania Electric Products, Inc. Defendant-Appellant* v. *Irene Barker, Executrix, Plaintiff-Appellee*, to the end that this cause may be reviewed and

determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be revised by this Court, and for such further relief as to this Court may deem proper.

Dated January 1956.

Attorney for petitioner
(s) THOMAS H. MAHONY

JOSEPH G. BRYER
EDWARD F. MAHONY
GEORGE T. PADULA
Of counsel

Appendix A

United States Court of Appeals
For the First Circuit

Nos. 4992 and 4993.

SYLVANIA ELECTRIC PRODUCTS, INC.,
DEFENDANT, APPELLANT,
v.
IRENE BARKER, EXECUTRIX,
PLAINTIFF, APPELLEE.

No. 4994.

IRENE BARKER, EXECUTRIX,
PLAINTIFF, APPELLANT,
v.
SYLVANIA ELECTRIC PRODUCTS, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Thomas H. Mahony for Sylvania Electric Products, Inc.
Peter E. Marchetti and *Harry B. Otis,* with whom *Thomas L. Mackin* and *A. Sheppard Taylor* were on brief, for Irene Barker, Executrix.

OPINION OF THE COURT.

December 20, 1955.

WOODBURY, *Circuit Judge.* These three appeals from two judgments entered on verdicts returned by a jury for the plaintiff present several questions of law both substantive and procedural. They arise out of the facts stated below in the light most favorable to the plaintiff.

Irene Barker, the plaintiff and the appellee in Nos. 4992 and 4993, is a citizen of Nebraska and the widow and executrix by appointment of the appropriate courts of both Nebraska and Massachusetts of Rexford L. Barker who, during his lifetime, was also a citizen of Nebraska. The latter, who will be referred to hereinafter as the decedent, was a bender of glass tubing used in making neon signs, and from the mid-1930's on he was employed in that capacity by Neon Products Company, Inc., of Omaha, Nebraska. His work consisted in plugging one end of a glass tube and blowing into the other end with his mouth to create pressure in the tube so that it would not kink or collapse while it was being heated in a gas flame to a malleable state and bent into the shape desired. It appears that when a tube cooled and the blower's lips were removed the heated air in the tube being under pressure blew back against the blower's lips, and it would seem to some extent into the blower's mouth.

During the early years of the decedent's employment only plain glass tubing was used. But starting about 1941 glass tubing coated on the inside with a compound containing beryllium came into use. At first this coating gave the appearance of having been painted on, and it did not slough off during the bending process, although it did have some tendency to flake off after a sign made with such tubing had burned for a time. During 1944, perhaps to remedy this defect, a new type of coated tubing came into use. This tubing was also coated on the inside with a beryllium compound but the coating was powdery and as a result it had a tendency to slough off during the heating and bending process. Thus when there was a blow-back the blower got some of the powder on his lips and in his mouth.

The decedent did no tube blowing in 1945 but worked outside during that entire year erecting and repairing signs. He resumed blowing tubes in 1946, and early in that

year his employer, while temporarily unable to obtain tubes from its usual source, General Electric Company—from which it had bought some forty to fifty thousand feet of coated tubing from 1944 to 1948—purchased about forty-five hundred feet of beryllium coated tubing manufactured by the defendant, Sylvania Electric Products, Inc., a Massachusetts corporation. All but two or three hundred feet of this Sylvania tubing was fabricated into signs in 1946 and the decedent blew most if not all of it.

Late in 1947 the decedent began to notice shortness of breath and coughing, and early in 1948 he sought medical assistance. The first two doctors he consulted gave him no help but later in the year, about November, a third doctor, after a thorough study of the decedent's symptoms and medical history and exhaustive laboratory and x-ray tests, diagnosed the trouble as berylliosis, a chronic disease of the lungs caused by inhaling particles of beryllium.[1] In the meantime, however, in September, the decedent had had to quit work because of his failing health.

Late in 1948 or early in 1949 the decedent brought an action against his employer and its insurance carrier in the appropriate local court in Nebraska to recover under the Nebraska Workmen's Compensation Act for his total disability. In July 1949 he was awarded compensation and the defendants appealed. In November both he and the defendants applied to the court jointly for permission to settle for a lump sum payment of $3,750, and about two weeks later their petition was approved. The court in its decree approving the settlement found that the decedent was "fully informed in the premises" and was "acting solely upon his own information and upon the advice of his own counsel after extended and exhaustive considera-

[1] The jury found specifically that by December 1st, 1948 the decedent knew or should have known that he was suffering from the disease.

tion of the entire matter and [was] not acting upon representations of the defendants or any of their representatives." And in paragraph III of both the application for leave to settle and the decree approving the application it is stated:

> "That plaintiff avers that shortly prior to September, 1948, he contracted an occupational disease known as berylliosis and consisting of a fibrosis of lung tissue, resulting from exposure to florescent powders containing beryllium, and that said beryllium poisoning culminated on or about September 13, 1948 in permanent total disability. That plaintiff stipulates that his exposure to said occupational disease was at least 40% contracted and incurred during a period prior to the time when the Occupational Disease Statute of Nebraska became effective,[2] and that at least 40% of his disability and medical expenses are not covered by said Statute, and that defendants are therefore not liable for at least 40% of the full benefits scheduled in said Statute."

The following year the decedent made a claim against the General Electric Company to recover damages for the same total and permanent disability. This claim was settled in May, 1950, for $17,500 and the parties entered into an agreement and release which in some respects resembles a covenant not to sue. At any rate it purports to settle only the decedent's claim against General Electric Company and expressly reserves "all rights, claims and demands that he may have against other suppliers of material to Neon Products Company." At the same time the plaintiff herself, both individually and as guardian of her minor son, executed similar agreements and releases with

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[2] Counsel agree that this statute became effective in August 1943.

General Electric in consideration of $2,000 and $500 respectively.

Three months later, in August 1950, the decedent brought suit in the court below under its diversity jurisdiction against Sylvania Electric Products, Inc., to recover for the same total and permanent disability. He died on September 12, 1952, before the case was reached for trial and the action was prosecuted thereafter by his widow in her capacity of executrix. This case on appeal is No. 4992 on our docket. On February 12, 1954, the executrix also brought suit against the defendant in the same court under the Nebraska death statute and this case on appeal bears our docket number 4993. The actions were consolidated below for trial by jury, the jury returned verdicts for the plaintiff, and the defendant thereupon took the present appeals from the judgments entered on the verdicts. After the judgments were entered the plaintiff moved that interest be added to the amount of each judgment calculated at six per cent from the dates of the respective writs. These motions were denied and the plaintiff appealed but later abandoned her appeal in the death case. Her appeal in the personal injury case is No. 4994.

Sylvania Electric Products, Inc., as appellant, contends that the application under oath for permission to settle the Nebraska workmen's compensation case for a lump sum payment, and the Nebraska court's decree thereon, establish conclusively that the decedent had and knew that he had berylliosis at least as early as August 1943. It rests three arguments on this contention. First, it says that its fault, if any, could not be causal, for none of its tubing was used by the decedent's employer until 1946. Second, it says that the decedent's cause of action for personal injuries prosecuted after his death by the plaintiff as executrix is barred by the Nebraska four-year statute of limitations (Rev. Stats. of Neb. 1943 (1948 Ed.) § 25-207) which

applies because of the provision in the Massachusetts statute of limitations (General Laws, Ch. 260 § 9) that, "no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein." And third, it says that the statutory bar to the maintenance of the action for personal injuries also bars the death action, because the Nebraska death statute provides that the cause of action for wrongful death permits such actions only if the party fatally injured could have maintained an action and recovered damages had he lived.

We do not pause to consider these arguments in detail for the foundation upon which they rest is unsound. The judgment of the Nebraska court in the workmen's compensation case is not binding here under the doctrine of *res judicata* because that was a suit against different defendants—the decedent's employer and its insurance carrier. Nor does the joint application for leave to settle the compensation case for a lump sum payment require the finding that the decedent was suffering from berylliosis prior to 1943. The statement quoted above from the application signed by the decedent is that his exposure to berylliosis began prior to 1943, but that he did not contract the disease until "shortly prior to September, 1948." This is not a statement that he was suffering, and knew that he was suffering, from berylliosis before 1943. But, even if it could be construed as a statement to that effect, it would not conclusively bind the plaintiff. So construed it would be admissible as a prior contradictory statement but as such its only use would be to detract from the credibility of the decedent's contradictory statements in his deposition put into evidence at the trial. It would also be admissible as a declaration against interest. As such it might indicate affirmatively that the decedent had contracted berylliosis prior to 1943. Still it would constitute at the most only

contradictory evidence which the jury could reject in favor of the evidence tending to show that the decedent's berylliosis did not manifest itself until sometime late in 1947 or early in 1948, although insofar as it was caused by the defendant's tubing it must have been caused sometime in 1946.

This raises the question of when the decedent's cause of action accrued under the law of Nebraska. For if it accrued prior to August 1946 his action for personal injuries brought in August 1950 is barred by the Nebraska four-year statute of limitations which applies because of the provision of the Massachusetts statute of limitations cited above.

Undoubtedly the decedent was exposed to the beryllium in the defendant's tubes before August 1946. But so far as the evidence in the record is concerned, he was similarly exposed after that date. But the question of the precise time when the decedent actually contracted the disease from which he died need not detain us, for what apparently controls under the Nebraska law is the time when the decedent knew that he had the disease. The Nebraska court has repeatedly held in workmen's compensation cases that the statutory period within which such actions must be brought does not begin to run until the employee acquires knowledge of a compensable disability, see the recent case of *Dryden* v. *Omaha Steel Works*, 148 Neb. 1 (1947), and from this we assume, in the absence of authority to the contrary, that it would apply the same liberal rule in actions of tort like the present. See *Urie* v. *Thompson, Trustee*, 337 U.S. 163 (1949). Thus, since the jury found specially that the decedent did not know that he had berylliosis until the first of December 1948, it follows that his personal injury action was not barred by the Nebraska four-year statute of limitations.

We turn now to the question of the sufficiency of the evidence to support the verdicts for the plaintiff.

There was evidence from which the jury could reasonably find that the decedent without knowing it contracted berylliosis in 1946, that his disease was caused in part by blowing tubes during that year manufactured by the defendant, that his disease manifested itself late in 1947 or early in 1948, that the decedent became totally incapacitated by it in mid-September 1948, that his disease was not diagnosed until some two months later, and that after its onset it progressed gradually until it caused the decedent's death on September 12, 1952.

We may assume that the defendant either knew or ought to have known the uses to which its beryllium coated tubes would be put, the method commonly used in fabricating them for their intended purpose, and that in their fabrication beryllium particles would be deposited on the workmen's lips and in their mouths. But neither the plaintiff nor the defendant introduced any evidence that in 1946 the defendant knew or was chargeable with knowledge that inhalation of beryllium was dangerous to health. Indeed, it would seem from *Harman* v. *Mitcham Works, Ltd.*, decided by the Supreme Court of Judicature, Court of Appeal, on June 21, 1955, that it may not have been until after 1946 that any one had any occasion whatever to believe that inhalation of beryllium particles would cause chronic disease of the lungs. Is this lack of direct evidence in the record that the defendant either knew or at least ought to have suspected that beryllium posed a danger to health fatal to the plaintiff's cases?

The nature and extent of the defendant's liability as the manufacturer of the coated neon tubing involved is, under well established principles, determined by the law of Nebraska where the decedent's injury occurred. And, it seems very evident from the citation and quotation in *Driekosen*

v. *Black, Sivalls and Bryson,* 159 Neb. 531 (1945), from §§ 388, 390, and 392 of the Restatement, Torts, vol. II, that the substantive rule in Nebraska is that a manufacturer is liable to a person injured by his product only when the manufacturer either knows, or from facts known to him should realize, that his product is, or is likely to be, dangerous for the use for which it is supplied. The question remains whether proof of this knowledge of actual danger or realization of possible danger is an essential part of a plaintiff's affirmative case, or whether lack of such knowledge or realization is a matter for the manufacturer to show in defense.

In Massachusetts the rule seems to be that every manufacturer is presumed to know the nature and qualities of his products.[3] *Thornhill* v. *Carpenter-Morton Co.,* 220 Mass. 593 (1915); see *Farley* v. *Tower,* 271 Mass. 230 (1930); and *Carter* v. *Yardley,* 319 Mass. 92 (1946) does not indicate to the contrary. Thus, once a plaintiff establishes in a Massachusetts court that a manufacturer-defendant's product is dangerous in its ordinary use, and that no warning of its danger was given, a presumption of the defendant's knowledge of the danger arises, and this presumption with, of course, proof of causation and injury, completes the plaintiff's *prima facie* case. Hence in Massachusetts it is up to a manufacturer-defendant to come forward, if it can, with exculpatory evidence of its faultless ignorance of the dangers of its product to those who might use it. But does this Massachusetts rule of presumptive knowledge apply in the case at bar or must we look to Nebraska's rule, whatever its rule may be?

The question posed lies in the field of conflict of laws.

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[3] This is certainly the rule when "inherently dangerous" articles are involved, and we think from *Carter* v. *Yardley,* infra, that in all probability it is also the rule when the articles involved are not in that category.

Thus, in accordance with the views expressed in Judge Magruder's opinion in *Sampson* v. *Channell*, 110 F.2d 754 (C.A.1, 1940), cert. den. 310 U.S. 650, endorsed in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), we refer to the conflicts rule in Massachusetts for the answer, for our choice of law must conform to the choice which would be made by the Supreme Judicial Court of that Commonwealth.

We cannot be sure what conflicts rule the Massachusetts courts would apply in the exact situation presented since we have found no Massachusetts case in point. Nevertheless we think the highest Massachusetts court would choose its own rule of presumptive knowledge as applicable in the case at bar in conformity with the general rule stated in § 595 of the Restatement, Conflict of Laws, which under the heading Proof of Facts reads as follows:

> "(1) The law of the forum governs the proof in court of a fact alleged.
>
> (2) The law of the forum governs presumptions and inferences to be drawn from evidence."

And see particularly *Comment c.* under the above section.

Further support for this view is found in *Gregory* v. *Maine Central R. R. Co.*, 317 Mass. 636 (1945). In that case the court considered the question whether a plaintiff in a suit in Massachusetts for personal injuries suffered in Maine had the burden of proving his lack of contributory fault in accordance with the law of Maine or whether the burden of proving his contributory fault rested upon the defendant in accordance with a Massachusetts statute. In holding that the Massachusetts statute applied, the court, with copious citations which we omit, spoke on pages 639 and 640 as follows:

> "What conduct constitutes contributory negligence of the plaintiff is a question of substantive law governed by the law of Maine, where the injury happened. But the law of the forum—Massachusetts—

governs the procedural question of the burden of proof, and under our statute the burden of proof of contributory negligence is on the defendant. The applicable substantive law of Maine as to what conduct constitutes contributory negligence goes no farther than to define it as a failure, contributing to the injury, to exercise as much care as the ordinarily prudent man would have exercised under like circumstances. Whether the evidence conclusively shows such failure or not, is a procedural question to be determined according to rules of practice in force in Massachusetts."

Since the Massachusetts statute referred to in the above quotation puts on the defendant the burden of proof in the sense of the burden of going forward with the evidence, which concerns us here, as well as the burden of proof in the sense of the burden of persuasion, with which we are not concerned, the *Gregory* case indicates that the burden of going forward with the evidence is regarded in Massachusetts as a procedural matter to be determined in accordance with the rules of practice in force in the forum. We do not think the rationale of this case is limited to contributory negligence.[4] Therefore we conclude that the plaintiff may maintain her cases even though she did not introduce any direct evidence that the defendant knew or should have at least suspected that its product was or might be dangerous to those who would use it.

Sylvania Electric Products, Inc., as appellant in Nos.

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[4] Perhaps the foregoing discussion of conflict of laws principles is academic for the reason that the Massachusetts court might apply its local rule of presumptive knowledge on quite different reasoning. The Nebraska court so far as we can discover has never considered the Massachusetts rule either to adopt it or to reject it, and in this situation, if the Massachusetts court should hold that Nebraska law applied, it might well follow the usual practice and assume in the absence of indications to the contrary that its rule of presumption was also the rule in Nebraska.

4992 and 4993 makes the further contention that it is relieved of all liability by the releases given to General Electric Company by the decedent and by the plaintiff individually and in her capacity of guardian of her minor son. The argument is that in the releases the decedent and the plaintiff admitted receipt of complete satisfaction from General Electric Company for their respective injuries. Wherefore it is said that to permit them to recover here would be to allow them more than one satisfaction for their injuries, which, of course, they cannot have. Thus, it is asserted that the reservation in the releases of rights against other suppliers of material to the decedent's employer is void and without effect because the releasors had nothing to reserve.

Again factual basis for the contention is lacking. The releases as we read them do not purport to have been given in full settlement of all the releasors' damages. They purport only to release General Electric Company insofar as it and it alone contributed to cause the losses suffered by the plaintiff and the decedent. Thus, the court below correctly charged the jury that it should deduct the gross amounts received in settlements or compromises ($28,502), from any verdict it might return for the plaintiff.

We have considered other arguments advanced by Sylvania Electric Products, Inc., as appellant, such as its argument that the decedent was guilty of contributory negligence as a matter of law, only to reject them as without merit. We do not think they call for separate discussion.

Irene Barker's appeal from the denial of her motion to amend the judgment in the personal injury case by adding interest on the amount of the verdict calculated from the date of the writ remains for consideration.

She rests her claim to interest exclusively on § 6-B of Chapter 231 of the Massachusetts General Laws quoted in

the margin.[5] We do not think the Massachusetts statute applies.

Both parties appear to concede, and we agree, that under the rule of *Klaxon* v. *Stentor Electric Mfg., Inc.*, 313 U.S. 487 (1941), the applicable law must be chosen in accordance with the conflicts rule of Massachusetts. And, as pointed out earlier in this opinion, Massachusetts follows the usual rule that liability in personal injury cases is governed by the law of the place where the injury occurred, *Trudel* v. *Gagne*, 328 Mass. 464 (1952); *Gregory* v. *Maine Central R. R.*, 317 Mass. 636 (1945). Presumably also, although we have found no case in Massachusetts squarely on the point, the courts there would follow the usual rule stated in § 412 of the Restatement, Conflict of Laws (1934), that "The measure of damages for a tort is determined by the law of the place of wrong." That is to say, in the words of *Comment a.* on § 412, "what items of loss are to be included in the damages" is determined by the law that creates the right to recover in the first place.

On principle, interest on a verdict from the date of the writ is an item of substantive damages awarded "in order that the plaintiff may be more fully and justly compensated for the wrong complained of." *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F.2d 893, 895 (C.A.1, 1953). And Massachusetts accepts this general principle, for in *D'Amico* v. *Cariglia*, 330 Mass. 246 (1953), the Supreme Judicial Court of Massachusetts in discussing the statute now under consideration and its predecessor said that

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[5] "*Interest from Date of Writ added to Damages Awarded in Certain Civil Actions.* In any action of tort in which a verdict is rendered or a finding made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damages to property, there shall be added by the Clerk of Court to the amount of damages interest thereon from the date of the writ, even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

"Under both statutes interest was to be included as an item of damages."[6] Under Massachusetts conflicts rules, therefore, it follows that the plaintiff's right to interest on the verdict in the personal injury case figured from the date of the writ must be determined by the law of Nebraska.

We are not referred to any Nebraska authority supporting the plaintiff's position. In this situation the Nebraska rule is presumed to be the general common-law rule as it prevailed in Massachusetts prior to the statutory changes, see *John B. Fray Co.* v. *S. Silk, Inc.*, 245 Mass. 534 (1923), and the Massachusetts rule prior to the statutory changes was that interest is not an element of the damages recoverable in actions of tort for personal injuries. *Cochran* v. *Boston*, 211 Mass. 171 (1912); see *D'Amico* v. *Cariglia*, 330 Mass. 246, 247 (1953).

The judgments of the District Court are affirmed.

Magruder, *Chief Judge* (concurring). I concur in the opinion and judgment of the court.

It is undisputed that under the substantive law of Nebraska a manufacturer owes a duty of ordinary care to remote but foreseeable users of his manufactured products, and is liable to such users for harm proximately caused by the manufacturer's negligence. If suit had been brought in a Massachusetts state court on this alleged Nebraska tort, no doubt the Massachusetts courts would apply the foregoing substantive law of Nebraska. See *Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45 (1941). Judge Wood-

[6] It should be noted that plaintiff's reliance on this case for the proposition that the inclusion of interest from the date of the writ is a procedural matter, is misplaced. The court there held procedural only the statutory *change* in the method of computing interest from computation by jury to computation by the clerk of court, not the right to have interest included as a part of the damages.

bury's opinion has found indications in the Massachusetts decisions that in such a suit, without regard to whether a Nebraska court would do the same thing, the Massachusetts courts would apply a "presumption," regarded by them as a rule of local procedure, that the manufacturer who puts the component parts together must be taken to know the nature and quality of the resultant product which he solicits the public to purchase. By this is meant not a conclusive or irrebuttable presumption, which becomes a rule of substantive law (see Am. L. Inst., Rest. of Conflicts § 595, Comment *c; Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45, 47 (1941)), but that such knowledge is a "compelled inference" in the event that the manufacturer fails to discharge his burden of "going forward with evidence" tending to show that he neither knew, nor in the exercise of care would have discovered, by preliminary tests or inspections, the potentially dangerous character of the manufactured product. Such was the situation in the case at bar, where the defendant did not go forward with any evidence of an exculpatory nature. The manufacturer in that situation is treated as if he knew, that is, he is "charged with knowledge," for by force of the presumption it must be taken that he actually knew, or in the exercise of due care would have discovered, the dangerous properties of his product before putting it on the market. Judge Woodbury's opinion also concludes that a federal district court sitting in Massachusetts in a diversity of citizenship case such as this would be bound to apply the rule of presumption which the Massachusetts state courts would apply, even though the state courts for their own purposes might classify such presumption as a local rule of "procedure." See *Boyle* v. *Ward*, 125 F.2d 672 (C.A. 3d, 1942).

I assume that Judge Woodbury's opinion is right in the foregoing respects, but since the subject matter is certainly a difficult and cloudy one I should like to add an

additional comment which tends to support the court's conclusion that the judgments for the plaintiff, now on appeal, should be affirmed. If Judge Woodbury's opinion is correct, the plaintiff below was entitled to a binding instruction that Sylvania must be taken to have known that the powdered beryllium with which it coated its glass tubing might cause a lung disease to artisans making the ordinary and expectable use of the product. The district court gave no such binding instruction, but the error, if it was an error, has become harmless to the plaintiff in view of the fact that the jury brought in a plaintiff's verdict anyway.

In the charge to the jury the district court said that a manufacturer who produces an article that is inherently dangerous "is presumed to know the nature and quality of the product and its component parts; and if he or it knew or should have known the product was inherently dangerous, the manufacturer owed a legal duty to use reasonable care to prevent injury to those whom he knows or has reason to know will use or come in contact with the product." By this I take it the district court merely meant that it was permissible for the jury to infer as a fact, on the preponderance of probabilities, that the manufacturer knew or should have known the dangerous character of its product. I say this because later in the charge the district court distinctly left it to the jury to determine as a fact whether the defendant knew or should have known by the exercise of reasonable care "that the tubes were inherently dangerous, namely that the powder particles of the tubes would slough off in their use and the powder content, beryllium, . . . was poisonous." The jury were told that it was for them to resolve that question. "If the defendant did not know or should not have known by the exercise of reasonable care, the plaintiff cannot recover, as it is the plaintiff's burden of proof to prove that the defendant knew or should have known."

In other words, all that the court below did was to apply to the situation the familiar rule of *res ipsa loquitur* in the simple form of a permissible, but not a compelled, inference. See *Sweeney* v. *Erving,* 228 U.S. 233, 240 (1913); *United States* v. *Hull,* 195 F.2d 64, 66 (C.A. 1st, 1952). The Massachusetts state courts would certainly have gone this far, and I take it also that the Nebraska courts would have done so, even though they might not have applied a rule of "presumption," that is, a compelled inference of knowledge in the absence of exculpatory evidence offered by the manufacturer. See *Miratsky* v. *Beseda,* 139 Neb. 299, 297 N.W. 94 (1941); *Security Ins. Co.* v. *Omaha Coca-Cola Bottling Co.,* 157 Neb. 923, 62 N.W.2d 127 (1954); *Benedict* v. *Eppley Hotel Co.,* 159 Neb. 23, 65 N.W.2d 224 (1954). And see Note, The Procedural Effect of Res Ipsa Loquitur in Nebraska, 33 Neb. L. Rev. 620 (1954).

Appendix B

Nebraska Law—Statute of Limitations

Revised Statutes of Nebraska of 1943 (1948 Ed)
Section 25-201. *Civil Actions; when commenced.*

"Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action has accrued."

Section 25-207. *Actions for trespass, conversion, other torts and frauds.*

"The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) An action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising in contract, and not hereafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud except as provided in sections 76-288 to 76-289."

Section 25-217. *Action; when deemed to commence.*

"An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, at the date of the summons which is served upon him; when service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made."

2. *Death case*

Rev. Stats. of Nebraska—1948 Edition
Sect. 30-809. *Action for Wrongful Death;* Creation.

"Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

Sect. 30-810. *Action for Wrongful death; Limitation; In whose Name Brought; Judgment; Disposition of Avails; Compromise of Claim; Procedure.*

"Every such action, as described in section 30-809, shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained . . . A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he was appointed shall first have consented to and approved the terms thereof . . ."

Nebraska—Workmen's Compensation Law.

Section 48-151—*Terms defined* . . .

"(2) The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

"(3) The term 'occupational disease' shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed."

Prior to enactment of Sub-section 3 above in 1943! Occupational disease was specifically excluded from the paragraph relating to accidents unless arising in "smelting, metal refining or battery manufacturing industries."

McCall v. *Hamilton Co. Farmers Tel. Assn.* (1938) 135 Neb. 70, 74.

Massachusetts General Laws, Chapter 260, *section* 2:

"Limitation of Six Years — The following actions shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues: First, Actions of contract founded upon contracts or liabilities, express or implied, except actions limited by the preceding section or actions upon judgments or decrees of courts of record of the

United States or of this or any other state of the United States.
Second, Actions of tort.
Third, Actions of replevin."

Massachusetts General Laws, Chapter 260, *section* 9:

"Suspension in Case of Non-Resident Defendant.—If, when a cause of action hereinbefore mentioned accrues against a person, he resides out of the commonwealth, the action may be commenced within the time herein limited after he comes into the commonwealth; and if, after a cause of action has accrued, the person against whom it has accrued resides out of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein."

Appendix C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL.

Royal Courts of Justice,
Tuesday, 21st of June, 1955.

Before:

LORD JUSTICE DENNING
LORD JUSTICE BIRKETT and
LORD JUSTICE PARKER

HARMAN
v.
MITCHAM WORKS LIMITED

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C. 2).

MR. TRISTRAM BERESFORD, Q.C., and MR. P. H. RIPMAN (instructed by Messrs. Lewis, Holman & Lawrence, agents for Messrs. Ross & Son, Horley) appeared on behalf of the Appellant (Plaintiff).

MR. E. RYDER RICHARDSON, Q.C., and MR. R. HOPKINS (instructed by Messrs. Carpenters) appeared on behalf of the Respondents (Defendants).

JUDGMENT

LORD JUSTICE DENNING: Mrs. Harman is a young married woman with two small children. Her life has been ruined by chronic beryllium poisoning. She has spent long

periods in hospital. She suffers from breathlessness, choking feeling, cough, palpitation, lassitude and mental strain. Her life has been shortened by 25 years. This has all been due to two months work which she did for the Defendants from July to September, 1947. They required her to work with a beryllium compound which is a deadly poison. One witness said that it is more dangerous than a poison. It is more like a radio-active material in an atomic plant. A slight exposure to it may have fatal results which do not appear for months or even years afterwards. The Defendants did not give Mrs. Harman the slightest warning that there was any danger in it. They say that they did not know themselves at that time that it was dangerous. So they refuse to pay her any compensation at all.

Let me now say who the Defendants are. They are a branch of the great concern known as Phillips Radios which is a worldwide organisation. In 1946 they were engaged in producing fluorescent lamps which was an important new industry. They had previously bought fluorescent powders from other people, but at the end of 1946 they decided to make some of the powder themselves. They built a new laboratory where they put in hand an "experimental process", as they described it, of mixing ingredients for producing a fluorescent medium. The work was "being hurried": but this was no doubt because they did not wish to be left behind in this new field. They got information from their associates in America on how to make this fluorescent medium: they employed a research chemist, Dr. Rothschild, who had made it in Germany before the war: they looked up the American Chemical Abstracts to see if there were any patents affecting the work: and they then started work on the process.

It was in this process that Mrs. Harman was engaged when she was poisoned. She had been with the company for some years on other work but on 14th July, 1947, she

was put into the new laboratory where this experimental process was being carried on. Her actual work was to sieve powder through a wire sieve with a brush but she helped with all parts of the process. After two and a half months she left on the 4th October, 1947, for domestic reasons. Some months later she was stricken with this dreadful illness due to the poisoning in the process.

The Defendants say that, when they put her on to this work, they had no knowledge that this process was dangerous and no reason to suspect it. They had been buying fluorescent powders for three or four years from large concerns like General Electric Company and British Thomson-Houston. Those concerns had never hinted that they were dangerous. The Defendants' workmen had used the powders and had never had any trouble with them. The American associates of the Defendants gave no warning of any danger. Nor had Dr. Rothschild. So the Defendants had no suspicion that the beryllium compound was a toxic substance; and they gave no warning about it to Mrs. Harman or any of their employees.

The Defendants, however, frankly admit that if they had had any suspicion that it was toxic they would have made a search which would have put them on their guard. Dr. Sutherland, their chief chemist, who was in charge of this process was asked: "do you agree that had any inquiry been made—real research been made—before putting these people on to work with beryllium, there would have been available to you the knowledge that beryllium was a toxic substance?", and he answered: "Yes, but we made no specific search with reference to beryllium because we did not suspect beryllium at all". He added: "If I had any idea that it was alleged to be a toxic substance, I would ask for a literature survey to be made, and I would ask our medical officer to study the situation and make recom-

mendations to us". Let me examine what would have happened if he had done so.

If the Defendants had had a literature survey made, they would have discovered in their very own library an entry which showed that these beryllium compounds were dangerous. It was an entry in the American Chemical Abstracts which they always took. Indeed they consulted it in March, 1947, for beryllium patents. But they did not consult it for beryllium toxicology. If they had done so, in the issue for 20th November, 1946, they would have found this entry: "Delayed chemical pneumonitis occurring in workers exposed to beryllium compound". (A reference is then given in an article on the subject in the American Journal of Industrial Hygiene). Case reports are given for 17 cases of a delayed chemical pneumonitis which occurred in a fluorescent factory where Be compounds are used. The American article which is there referred to was available in England at that time. It was certainly in the Patent Office Library, and probably in the library of the British Medical Association. If the Defendants had referred to the article itself they would have found a full discussion starting with the words "A puzzling disease has appeared in employees of a concern manufacturing fluorescent lamps . . . beryllium has attracted little attention in the United States until recently because it has been used in American industry very little until the war years—Kress and Crispell in 1944 presented cases of an atypical pneumonia in men working with fluorescent powder containing beryllium. Six months ago Van Ordstrand presented an extensive report of illness in the workers of the beryllium industry. The present series is concerned with pulmonary disease in an industry where beryllium compounds are used". Dr. Sutherland, the Defendant's chief chemist, admitted that a specific search would have found those documents.

Apart from those documents if the Defendants had asked

their medical officer to study the situation there is no doubt that he would have reported that the substance was dangerous. Dr. Franks, their present medical officer was asked what his opinion would have been if he had read the literature available at the end of 1946. He answered: "I would have considered beryllium oxide dangerous at the end of 1946": and he added: "I could have obtained, if I had wanted it, all the relevant American literature on this problem at the end of 1946 from the library of the British Medical Association in London". The learned Judge seems rather to have discounted Dr. Franks' evidence but he was the only medical officer called by the Defendants—or indeed on either side—and I see no reason why this admission should not be taken against them. Furthermore, the British Medical Journal had published an article as far back as 9th October, 1943, on the "toxic hazard of beryllium" which referred to an American article on "The Toxicology of Beryllium", in which it was said that a chemical pneumonia had been observed in three workmen employed in extraction of beryllium oxide.

It is quite plain, therefore, that the Defendants, by making research, could have discovered that this substance was dangerous before ever they put Mrs. Harman on to work with it. As it was, they did not make any research into its toxic qualities. The reason was because they did not suspect the substance at all. So they found out nothing and gave her no warning.

The Defendants did not discover the dangerous nature of the substance until the 15th December, 1947, by which time Mrs. Harman had left their employment. One of their medical officers in Blackburn then reported that "lung diseases, acute and chronic, have been recorded in the basic beryllium industry and in the fluorescent lamp and radio tube industry where beryllium compounds have been used". In 1948 the dangers of beryllium were discovered to be so

great that it was no longer used and has been replaced by a different substance altogether.

Such being the facts, the Judge has exempted the Defendants from any liability to pay compensation to Mrs. Harman. He states his conclusions in these guarded words: "I am unable to say that, in all the circumstances of this case, I am satisfied that the Defendants ought to have known that their process was a dangerous one, which means too, that I am unable to say that the Defendants are actually in breach of their duty to the Plaintiff". It looks as if the Judge thought the case very near the line and only decided as he did because he was not satisfied that the Defendants ought to have known of the danger. Despite the care which the Judge gave to this case, I think there is one thing which he overlooked. He failed to recognise the high duty of care which the law places on those who deal in dangerous things. This beryllium compound was beyond doubt a thing which was dangerous in itself—dangerous *per se*, as it is said. It comes, therefore, within the special category in which the law requires people to use the greatest possible care. The duty was described by Lord Dunedin in these words: "It has, however, again and again been held that in the case of articles dangerous in themselves such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty to take precautions imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity", see *Dominion National Gas Company* v. *Collins*, 1909 Appeal Cases at page 646. That passage was expressly approved by Lord Atkin in *Donoghue* v. *Stevenson*, 1932, Appeal Cases at page 596 where he said that it "exactly sums up the position".

It is worth recalling the words in which great lawyers have spoken of this duty in regard to dangerous things.

Sir Frederick Pollock said in his book on Torts that in these cases the law "subjects the actor to strict responsibility. Sometimes the term 'Consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough". (15th Edition, page 386). Lord Macmillan, in an oft-quoted passage, said that "the law exacts a degree of diligence so stringent as to amount to practically a guarantee of safety", see *Donoghue* v. *Stevenson,* 1932, Appeal Cases at page 612. Lord Simonds expressly accepted those words in *Read* v. *Lyons,* 1947 Appeal Cases at page 182, and added his own, saying that the obligation "is to be ultra-cautious in carrying his ultra-hazardous activity".

Those emphatic statements clearly apply where the Defendant knows that the thing is dangerous, but what is the position when he does not know? Can he escape his due responsibility by pleading ignorance? Surely not. The duty has never been stated to rest on knowledge, see *Burfitt* v. *Kille,* 1939 2 King's Bench at page 749, per Mr. Justice Atkinson. The reason is plain: a dangerous thing has a more deadly potential in the hands of a man who is ignorant than one who knows of the danger. A man who points a loaded gun cannot escape his responsibility by pleading that he did not know it was loaded. Consider the old case where a man had taken out the priming and did not know the gun might go off. He had used as much care as would commonly be thought enough and still he was held responsible, see *Dixon* v. *Bell* (1816) Maule and Selwyn, at page 198. Take a modern case where a forwarding agent handed a dangerous chemical ferro-silicon to a bargee for carriage. The ferro-silicon was packed in casks, and the forwarding agent did not know it was dangerous and was not negligent in not knowing. During the journey the ferro-silicon gave off poisonous fumes and killed the bargee and injured his wife. The forwarding agents were held

liable, not only for the death of the bargee (with whom they had a contract) but also for the injuries to his wife with whom they had none, see *Bamfield* v. *Goole*, 1910, 2 King's Bench, at page 94. Lastly take the case where manufacturers supplied a special cleaning fluid called "pluperfect liquid" for cleaning ships. They had supplied it in large quantities for eight or nine years without complaint. They knew the ingredients but did not know it was dangerous. It turned out that, when this liquid came into contact with cast iron, it generated an explosive gas. An explosion occurred and damaged the ship. Mr. Justice Roche held that the liquid was a thing dangerous in itself and that the manufacturers were liable to the shipowners, even though they had no contact with him and did not know the stuff was dangerous. Nor was any negligence found against them in not knowing, see *Anglo-Celtic Shipping Company* v. *Elliott* (1926) 42 Times Law Reports, at page 297.

If and in so far as those cases would seem to suggest that there is an absolute liability for dangerous things, irrespective of negligence, they cannot stand with *Read* v. *Lyons*, 1947, Appeal cases at page 156: but in so far as they put a very high duty of care on a man to find out whether the thing is dangerous or not, and to give warning of it, they are in my opinion perfectly good law. In regard to things which are dangerous in themselves, the law requires everyone who deals in them to take the greatest possible precautions not only to avoid the danger when it is known, but also to find out whether there is danger or not. If the Defendants in this case had handed the beryllium compound to a carrier, without giving him any warning that it was dangerous, they would undoubtedly be liable to any one of the carrier's servants who was injured by it. So should they be liable when they hand it to one of their own servants, and requires her to work with it,

without giving her any warning that it is dangerous. It i
all very well for them to say that they did not suspect i
They ought to have suspected it until it was proved harm
less. They were starting a new process, an "experimenta
process", as they themselves called it. It behoved them
not only to call in their research chemists to tell them ho
to make it, but also to call in their medical officers to advis
them whether it was safe for their workers to handle. The
did not do this: and their failure to do so was a breac
of duty for which they are responsible.

It was suggested that if there was any breach of duty
her illness was not caused by it. I do not agree with thi
suggestion. It does not come well from a person, wh
has broken his duty to say that, if he had not broken i
the damage would have occurred just the same, see *Moriso*
v. *Walter* in the House of Lords recited by Lord Justic
Scutton in *Coldman* v. *Hill,* 1919, 1 King's Bench a
page 457. If I am right up to now it means that, if th
Defendants had done their duty, they would have foun
out that this substance was dangerous. Thereupon the
would be bound, I should have thought, to warn the Plain
tiff of the danger. In *Donoghue* v. *Stevenson,* 1932, Appea
Cases at page 602. Lord Thankerton said the duty wa
either to afford protection or to give adequate warning. I
the Defendants had warned Mrs. Harman that the sub
stance was dangerous, she would probably have said sh
would rather not work with it: and in that case she woul
not have been injured. The damage is therefore traceabl
to their breach of duty.

I would only add that, as I see it, this case shows th
justice of our law about dangerous things. It does no
seem right that a great concern should exploit a ne
process at the risk of their workers without a word t
them of the dangers which it entails. It lies ill in the
mouths to say that they did not know it was dangero

when their own medical officers, if they had been asked, could have looked it up and told them so.

I would allow the appeal.

LORD JUSTICE BIRKETT: This is an appeal from a judgment of Mr. Justice Gorman given on the 17th of January of this year. It raises questions of great importance, and also reveals facts of the most unusual kind. The Writ which was issued in July, 1953, was settled by Counsel of very great experience in this class of case and read: "The Plaintiff's claim is for damages for personal injuries and consequential losses and expenses occasioned to the Plaintiffs by reason of the negligence and/or breach of statutory duty of the Defendants their servants or agents between the months of July and October, 1947, at their factory premises known as Salfords, Redhill, in the County of Surrey".

When the Statement of Claim came to be delivered in October of 1953 the same learned counsel in Paragraph 3 stated the issue in this form: "The Defendants' said premises at Salfords aforesaid in the year 1947 were known as the Mullard Research Laboratories, and therein *inter alia,* was carried on a certain process in connection with the mixing of ingredients for use in fluorescent lighting tubes. The said ingredients consisted *inter alia* of beryllium, which was in fact and as the Defendants their servants or agents knew or ought to have known a substance of high toxity to human beings the use of which involved danger to health in particular if the same in any form was inhaled". At the trial before Mr. Justice Gorman, the learned Counsel appearing for the Plaintiffs and the Defendants agreed (to use the words of the learned Judge) "that this paragraph of the Statement of Claim crystallised exclusively the allegations of breach of duty alleged against the Defendants, and that this alone was the issue of breach of duty which in this action I have to determine. That

issue would thus appear to be in terms: Did the Defendants or their servants or agents know, or ought they to have known, that the beryllium compounds with which the Plaintiff was working were of high toxicity to human beings, the use of which involved danger to health, in particular if the same were inhaled in any form?".

The Plaintiff, Mrs. Harman, was a young married woman of 22 years of age in July of 1947. She had been employed by the Defendants since 1942, but on July the 14th, 1947, she worked in a new laboratory the Defendants had built at Salfords, Redhill, and continued to work there until the 4th of October, 1947, when she left the employment of the Defendants for domestic reasons of her own. When she left the Defendants she was in perfect health and no complaints of ill-health were raised by her, or on her behalf, during the time she worked in the laboratory. For nine months after she left the Defendants she was apparently quite well, but in July of 1948 she began to feel unwell. The agreed medical report which was before the learned Judge was made in December, 1954, and from that document it is clear that her illness was due to acute beryllium poisoning. It was admitted at the trial before Mr. Justice Gorman that Mrs. Harman was working in the laboratory from July to October, 1947, that she there was working with two compounds of beryllium, of which one was beryllium oxide and the other zinc beryllium silicate. Both these compounds were powders. It was also admitted that she was never warned about any dangers connected with the work she had to do in connection with the two compounds, and that her illness was due to beryllium poisoning. It would appear, though some matters are still in doubt, that there are two forms of illness which may arise from contact with compounds of beryllium, one being an acute disease resembling pneumonia, and the other a chronic disease which may occur one month to five years after exposure

to the compounds. The acute disease may follow exposure to high concentrations, and the chronic disease may follow exposure to minute concentrations. Some people would appear to be immune, and some particularly sensitive, so that it has been suggested that there may possibly be some condition of the blood which determines whether the person working with the compounds is immune or not.

From this bare recital of some of the main facts of this appeal, it will be seen that the task of the learned Judge, and of this Court, was by no means an easy one. Mitcham Works Limited was a subsidiary company of a great organisation. The Plaintiff was a young married woman whose life had been irretrievably ruined because of her work in the laboratory of the Defendants. It was almost inevitable that the contrast between the Plaintiff coming to the Court under the provisions of the Legal Aid and Advice Act of 1949, and the powerful Defendants, who could no doubt pay compensation without feeling it, should spring to the mind. But considerations such as these could not assist in the proper determination of the legal question the learned Judge propounded: Did the Defendants know, or ought they to have known that the beryllium compounds were of high toxicity to human beings, the use of which involved danger to health?

The only question argued in this Court was whether the Defendants ought to have known and whether they were in breach of their duty to the Plaintiff in not knowing, for Mr. Tristam Beresford made it plain that he could not argue that the Defendants did in fact know. The conclusions to be drawn from the evidence given before the learned Judge are, therefore, of supreme importance. One of the witnesses called for the Defendants was a Dr. Siegfried Rothschild, a research chemist, who had personal knowledge of beryllium compounds from 1937 onwards. It would appear that the year 1937 was the year when Beryl-

lium compounds were first used in industry and Dr. Rothschild was concerned with their use in Germany. The firm for which he worked was a subsidiary of Osram the makers of fluorescent lamps, and he stated that large numbers of people were brought into contact with the beryllium compounds, beryllium oxide and zinc beryllium silicate. He said that he had no knowledge that these compounds were dangerous to human beings until the 15th of December, 1947, when he received a copy of a report made by a medical officer employed in one of the branches of the Defendant company. That report made quotations from "Chemical and Engineering News", dated October 13th, 1947, and from "Occupational Medicine", dated July, 1947. When Dr. Rothschild came to England in September, 1938, he was employed by Messrs. Thomas Tryer, a subsidiary of Albright and Wilson and stayed with them until 1940 and made the beryllium compound powders for his employers. From August, 1941 to December, 1944, he was employed by the Pye Electrical Company of Cambridge, and these powders were also used by that company. Only a very few people were brought into contact with them at Tryers and Pyes, but Dr. Rothschild had never known a case of illness of one of the workers engaged in handling these powders either in Germany or in England. In 1944, Dr. Rothschild was employed by the Defendants. He first worked for a subsidiary company called Stella Lamps Limited who were making zinc beryllium silicate for use in the manufacture of fluorescent lamps. When the Defendants erected the laboratory in which the Plaintiff worked, Dr. Rothschild also worked in the laboratory and began actually to make some of the beryllium compounds there. But before Dr. Rothschild began the making of the powders, the Defendants had been buying the powders from the General Electric Company and the British Thomson Houston Company, and that practice continued after the Company began to

make the powders, for never at any time did the Company make enough for its purposes, and Dr. Rothschild said the quantity made was a small fraction of the total amout used.

It is a circumstance of great weight in considering the liabilities of the Defendants that no word of warning as to the nature of these powders was ever given to the Defendants by either of these well-known companies, who continued to supply the powders to the Defendants during the months the Plaintiff was employed by the Defendants, i.e., from July to October, 1947. Dr. Sutherland, an industrial chemist and a scientist of some distinction, employed by the Defendants for many years, said that he first heard of beryllium compounds being said to be toxic in December, 1947, and he spoke of the steps he took in consequence of what he had heard. The Defendant had been using beryllium oxide for making radio valves since 1942 or 1943 by a process they obtained from the United States of America and they operated that process without making any enquiries and were still doing so at the date of the trial of this action. Dr. Sutherland had never known of a case of beryllium poisoning, and nobody had ever drawn his attention to any possible danger until December, 1947. Dr. Strange who had been working with beryllium oxide and zinc beryllium silicate from 1936 to 1941 whilst in the employment of Electrical and Musical Industries Limited, and from 1943 to 1948 whilst employed by Thorn Electrical Industries Limited said that he had suffered no ill effects himself, and knew of none affecting the persons who were working with the compounds. In 1947 a man had died but that was not thought to be in any way connected with the use of the beryllium compounds, and Dr. Strange first heard of the possible danger from these compounds from an American visitor in December, 1947. Other evidence was called for the Defendants to support their contention that

they had no knowledge of the dangers of beryllium compounds at the time the Plaintiff was working for them in 1947, and to rebut the suggestion that on the facts they ought to have known. The submission of Mr. Tristram Beresford was that the Defendants ought to have instituted what was called a "Literary Search" before starting to use the beryllium compounds, and he said that if such a search had been instituted the Defendants would have had knowledge that beryllium compounds were at least under grave suspicion of being dangerous, and they could have warned their workpeople, or taken precautions, or abandoned the use of the compounds altogether. The question of when such "Literary search" should have been instituted is obviously a question of great importance. Should it have been done before the Defendants began to use any of the powders they purchased from the General Electrical Company of British Thomson-Houston?

Should it have been done in 1942 or 1943 when the Defendants began using beryllium oxide for making radio valves having obtained the material from the United States of America? Or should it have been done when the Defendants first began to make the powders themselves, which would appear to be in 1945 or 1946?

The growth of knowledge as to the nature of beryllium compounds was not rapid, and it would seem that the paper of Dr. Williams entitled: "Significant Aspects of Exposure to Beryllium Compounds in Industry", first really enlightened the industry as to the nature of the problem. This Paper was published in the United States in July 1947 and when it became available in England is not known, but it was in December, 1947 that Dr. Plum wrote his memorandum based on Dr. Williams' Paper which Dr. Rothschild and Dr. Sutherland saw. By that time, of course, the Plaintiff had left the employment of the Defendant. It is significant that so late as July, 1947, Dr. Williams could

say: "The case against beryllium is not clear-cut. There are many voids and contradictions in the data. It is the purpose of this paper to review briefly the evidence and to indicate the need for further data to show the proper status of beryllium as an industrial hygiene problem". Mr. Beresford produced certain documents going back to 1938 and said that a literary search would have made the Defendants acquainted with them. Many of these documents came from America and the learned Judge examined them all with very great care. He subjected them all to an analysis of what information they in fact disclosed, and to an enquiry as to when the material was available in this country, bearing in mind that from 1939 to 1945 this country was at war. At the end of 1947, after the Plaintiff had left the employment of the Defendants, the dangers of Beryllium compounds was made quite plain in the memorandum of Dr. Plum which Dr. Rothschild and Dr. Sutherland both saw. The learned Judge came to the conclusion that the alleged breach of duty on the part of the Defendants was not made out and in making known his decision he said: "I need not, of course, emphasize that I have studied everything that has been brought here and brought to my notice on the matter; but that is the clear view that I have formed".

The learned Judge was obviously much impressed by the evidence which showed that the beryllium compounds had been in use in the Defendants factory for many years with no reason to suspect any danger to the workers. He had the evidence of commercial use by firms such as the General Electric Company and British Thomson Houston Company with no evidence of warnings from those two great firms. In considering the evidence of Dr. Frank it must be remembered that he said that if the material had been in commercial use for years before 1946 he would not have thought it necessary to take the precaution of

obtaining all the American literature on the subject. There is no doubt that the Defendants had been using beryllium compounds for many years. They obtained it from firms of the highest possible standing. They received no warning of danger from anybody until 1947, after the Plaintiff had left their employment, and took action at once; and in 1948 abandoned the use of the compounds altogether. Although they began to make small quantities of the compounds in 1946, in no sense were they exploiting a new process at the risk of their workers without a word to them of the dangers which it entailed. They were not starting a new process in any true sense of the words at all. They still continued to use the powders they bought for the bulk of the work, but they began to make some of the powders themselves. But they were not making something new and hitherto unknown. They had no reason to suspect the substances of any toxic dangers from their past experience, and it would seem to be putting the duty on the employer very high indeed to say that despite their experience, they should have suspected the powders until they were proved harmless.

It is to be observed that no argument was addressed to the learned Judge, nor was any argument addressed to this Court on the basis that the beryllium compounds were dangerous in themselves, and were to be considered in the light of the cases dealing with things dangerous in themselves. It ought to be said that Lord Justice Denning in the course of the argument specifically raised the question and mentioned one or two of the cases in brief but neither Mr. Ryder Richardson nor Mr. Tristram Beresford argued the matter at all. None of the cases on this branch of the law were cited by Counsel at any stage of the appeal. From the discussion by Professor Winfield in his chapter on Dangerous Chattels in his book on the Law of Tort, the fifth edition, and the cases there cited, it is plain that had

the Plaintiff ever raised the question, the Defendants might have wished to argue that the law concerning dangerous chattels had no application to the facts of this particular case, and that before any higher standard of duty than the standard of reasonable care came to be applied such as "consummate care" or "a guarantee of safety" or "strict liability", it would be necessary to show knowledge of the dangerous thing on the part of the Defendants. Professor Winfield says at page 548: "It is true that the law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter, or in keeping a bottle of poison than a bottle of lemonade. But this is only another way of saying that what is a reasonable amount of care in one set of circumstances is not so in another set of circumstances, and reasonable care is the sole test of negligence. And, passing to the decided cases of dangerous chattels, we have been unable to trace anything in the reports that is inconsistent with the view that the law of negligence is all that is needed for the purpose.

In *Dixon* v. *Bell*, 1816, 5 Maule and Selwyn's Reports, Lord Ellenborough held the defendant liable when he had sent a mulatto girl to the house of one Leman to fetch a gun which he kept there, although he had told Leman to draw its priming before he gave it to her. Leman did draw the priming and told the girl he had done so. Yet when in play she pointed the gun at a child of eight and pulled the trigger so that the gun went off and injured the child, the Defendant was held liable because his duty was to render the gun "safe and innocuous" either by discharging it or withdrawing its contents. Mr. Justice Bayley said the gun ought to have been so left as "to be out of all reach of doing harm". The duty on the Defendant it would seem was to use reasonable care, and by want of care he had left the gun capable of doing injury, although he mistakenly thought he had made it safe. But in *Donoghue*

v. *Stevenson*, 1932 Appeal Cases at page 562, Lord Macmillan said at pages 611-612: "The exceptional case of things dangerous in themselves, or known to be in a dangerous condition has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort . . . I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety". This conjunction of words by Lord Macmillan, "The exceptional case of things dangerous in themselves, or known to be in a dangerous condition" seems to point to knowledge before liability.

Poison, explosives, loaded guns are things dangerous in themselves, and persons dealing with such things must show that degree of diligence so stringent as to amount practically to a guarantee of safety. A similar rule applies to things known to be in a dangerous condition. If the law relating to dangerous things is to be invoked against the Defendants so that they are under a "strict liability" as compared with the ordinary duty to take reasonable care, and in order to exonerate themselves they must prove what Sir Frederick Pollock called "consummate care" towards other persons, then it would seem that the Defendants are entitled to the right of making their submissions on the subject. Mr. Tristram Beresford never suggested that the Defendants in fact knew that beryllium compounds were dangerous; his case always was that they ought to have known. He never suggested that the liability of the Defendants approximated to an absolute liability, or that the degree of care should amount practically to a guarantee of safety so that to excuse themselves the Defendants must show "consummate care"; he suggested that the Defendants had failed in their duty to take reasonable care in that reasonable care would have given them the means of knowledge which he admitted they did

not possess. In *Bamfield* v. *Goole*, 1910, 2 King's Bench, at page 94, the case turned on the delivery to a common carrier of some casks of a chemical called ferro-silicon.

It is clear from the Judgment of Lord Justice Vaughan Williams in the Court of Appeal that the Defendants were held liable because of their neglect of duty in describing the goods as "general cargo" and not as "ferro-silicon": and by Lord Justice Moulton and Lord Justice Farwell because the defendants impliedly warranted that the goods were fit for carriage in the ordinary way and not dangerous. In *Anglo-Celtic Shipping Company* v. *Elliott*, 1926, 42 Times Law Reports, at page 297, the owner of a steamship sent it for the cleaning of a cast iron condensor to the first defendants and told them to use a particular cleansing fluid manufactured by the second defendants. This fluid unknown to the plaintiffs and the first defendants gave off hydrogen which made an explosive mixture in the air. An explosion in fact took place and the second defendants were held liable because the cleansing fluid was dangerous in itself and no warning had been given with the instructions sent out by the second defendants. But in my opinion, these cases do not assist in the determination of the question the learned Judge had before him. At the same time, I cannot think that the Defendants were under a duty of care so stringent as to amount practically to a guarantee of safety when they had no knowledge of the dangerous thing and when all their experience was to the contrary. I think the learned Judge applied the right test to the facts before him, and that was whether in all the circumstances of the case, when they had no knowledge of the danger, when they had had many years experience in the use of the beryllium compounds without being put on enquiry because of illness or disease happening to the workers in the industry, when they had for many years been purchasing the compounds from firms of the highest

repute without any warning of danger being given to them, ought they reasonably to have known of the danger by making the "literary search" referred to in the evidence or instructing their medical officers to investigate the possibility of danger.

I think the learned Judge answered the question correctly and I would, therefore, dismiss this appeal.

Lord Justice Parker: During the year 1947 the Defendants were making, in a new laboratory at Salfords, Redhill, a powder consisting of Zinc Beryllium silicate for use in the manufacture of fluorescent lights. From July to October of that year the Plaintiff was working in that laboratory and came in contact with two compounds of beryllium, namely, the finished article, Zinc beryllium silicate and an ingredient used in its preparation, Beryllium oxide, also a powder. In December, 1947, after she had left the Defendants' employment she developed a cough and breathlessness, and was found to be suffering from chronic beryllium poisoning, which it is admitted was due to her contact with one or other of these beryllium compounds. Little is as yet known about the disease save that it is of a delayed action type, symptoms not occurring until 3 months to 5 years after exposure. It is also known that the intensity of the disease bears no direct relation to the concentration of the exposure and while most people are unaffected there are those in whom the inhalation of but one speck of the powder will set up the disease. Indeed, it is thought that there must be some further element involved, possibly the condition of the blood of the patient.

So far as the alleged breach of duty is concerned the issue for the decision of the learned Judge was stated in these terms: "Did the Defendants or their servants or agents know, or ought they to have known that these two beryllium compounds were of high toxicity to human beings, the use of which involved danger to health in particular

if the same were inhaled in any form?". Before this Court it was conceded, in the light of the evidence, that the Defendants their servants or agents in fact did not know of this toxicity until after the Plaintiff left their employment, and accordingly the question now is whether they ought to have known.

Shortly stated, the Plaintiff's case is as follows. Before you, the Defendants, began using these beryllium compounds for the purposes of gain it was your duty to make an exhaustive search of all the literature on the subject. In particular this became your duty when at the end of 1946 or the beginning of 1947 you began making Zinc beryllium silicate in the new laboratory. If you had done so, the contention runs, you would have discovered that beryllium, the element, and some at any rate of its compounds were known to be toxic, and that then you should have taken proper precautions to avoid inhalation of dust, or have discontinued the use of the powders, as you in fact did in 1948.

I will deal first with the question of duty. Would a reasonable and prudent employer mindful of the necessity of conducting his operations so as not to expose his employees to unnecessary risk have made such a search? The answer to this question must necessarily depend on all the circumstances of the case. If, for instance, there is any reason to believe that a substance is likely to be toxic and inherently dangerous, then, no doubt, a reasonable and prudent employer should make such a search particularly if the substance is one which has not been used or manufactured before on a commercial scale. On the other hand, if there is no reason to suppose that the substance is toxic, and it has been for some time used and manufactured commercially by others in this country and without ill effects there would appear to be no reason why an employer should do

otherwise than act in accordance with the general principle of hygiene observed where a dusty process is involved.

It is important, therefore, to consider the exact circumstances here. In 1943, the Defendants began using Beryllium oxide to manufacture getters for radio valves. The process was obtained from America and the instructions for its use disclosed no necessity for special precautions. Some time before the 1st January, 1945, they had commenced using Zinc Beryllium silicate in the manufacture of fluorescent lamps. The Beryllium oxide and the Zinc beryllium silicate were obtained from the General Electric Company Limited and the British Thomson Houston Company Limited, and it is clear that no warning as to their use was ever given by these well-known companies. On the 1st January, 1945, a Dr. Rothschild began working for Stella Lamps, an associate company, making Zinc beryllium silicate for use in the manufacture of fluorescent lamps. He continued making the substance and at the end of 1946 or the beginning of 1947 he went to the Defendants' laboratory at Redhill and continued making the substance there. The Zinc beryllium silicate made in the laboratory was only a fraction of that needed by the Defendants in the manufacture of fluorescent lamps and throughout the period the Defendants continued to purchase it from the companies referred to above. Dr. Rothschild had had considerable experience of Zinc beryllium silicate. The earliest patent was in 1935. In 1937 he was making the substance in Brussels with a company Auer Gesellschaft. From September, 1938, on his arrival in England, until May, 1940, he made the substance with a subsidiary of Allbright & Wilson. After a short period of internment he had gone to the Pye Electrical Company of Cambridge, and again made the substance. Both Dr. Rothschild and Dr. Sutherland stated, and the learned Judge accepted their evidence, that until December 1947, they had no reason whatsoever to suspect

that either Beryllium oxide or Zinc beryllium silicate were in any way toxic. Numbers of persons had been in contact with these substances with apparently no ill effect, and there was nothing to put them upon inquiry. Dr. Strange, another experienced chemist, and quite an independent witness, gave evidence from his experience. He had worked with Beryllium oxide and Zinc Beryllium silicate with Electrical and Musical Industries Limited, from 1936 to 1941, and with Thorn Electrical Industries Limited from 1943 to 1948. He also said that he had, until 1948, no reason to suspect either of these substances. Numbers of people in these two companies had been in contact with these substances without any ill effect until in 1947, he thinks the latter part of the year, an employee died. Even then it was not suspected that beryllium poisoning was the cause—it was thought to be a form of cancer. Further, Factory Inspectors had no reason to suspect the substances.

At the end of 1947, however, it was suddenly brought home to the trade in this country that these two substances might be dangerous to some people causing this chronic poisoning. No doubt this knowledge resulted from an article by an American doctor, Dr. Williams, entitled "Significant Aspects of Exposure to Beryllium Compounds in Industry", which was published in America in July, 1947, in a copy of "Occupational Medicine". When knowledge of this article reached this country is not clear. Dr. Sutherland said that it was not available here in July, 1947. Dr. Frank did not see it till January or February, 1948, but in December, 1947, a Dr. Plum, a doctor working for the Defendants or one of the associated companies knew of it and warned Dr. Rothschild and Dr. Sutherland of the contents of the article. About the same time a visiting American warned Dr. Strange and suggested that the suspected cancer in the employee who had died might be beryllium poisoning. Even then, as the suggested precau-

tions in that article show, the danger of inhaling even a speck of dust was not as yet appreciated. Indeed, on present knowledge, the only safe course appears to be to abandon using the substance which the Defendants have in fact done.

Mr. Tristram Beresford for the Appellant stressed the fact that no one had been called by the Defendants from the General Electric Company Limited, the British Thomson Houston Company Limited, E.M.I. Limited, or Derbys Limited of London, all of whom had made or used these substances, to speak as to their knowledge at the relevant time; as to the precautions, if any, adopted by them; or, indeed, as to whether at the relevant time they were still using or making the substances. It is, perhaps, unfortunate that no such person was called, but this at any rate is known, that throughout 1947 all but a fraction of the Zinc beryllium silicate used by the Defendants was supplied by the General Electric Company Limited and the British Thomson Houston Company Limited and supplied without any warning as to its dangerous qualities. During 1947, the use in this country of these two substances was becoming more and more extensive, and I find it impossible to believe that if any of these companies were aware of the danger their knowledge would not have been available in the trade generally. In any event, it is for the Appellant to prove her case, and one of the simplest methods would have been to show, if she could, that other employers had discontinued its use, or taken some special precautions.

The learned Judge came to the conclusion in all the circumstances of the case that the Appellant had not proved any breach of duty in failing to make an exhaustive search for any literature concerned with these substances, and I agree with him.

That is enough to dispose of this case, but even if I am wrong, I should have great difficulty in holding that the Appellant's illness was caused by that breach of duty.

Assuming that the Defendants had discovered the contents of the various articles on the subject within a short time of their publication, it does not follow that as reasonable and prudent employers they would have adopted the only safe course, namely, to discontinue the use of the substances before the Plaintiff came in contact with them. I need not go through all the articles in detail. It is enough to say that the earlier articles were all concerned with possible dangers in the extraction of the element Beryllium from its ore, and any danger was thought to arise from the beryllium itself, or from beryllium fluoride or oxyfluoride. Later, articles showed that there was a danger due to the inhalation of dust from other beryllium compounds, the danger being the result of massive exposure causing an immediate acute pulmonary reaction. That was not the disease contracted by the Appellant, and, indeed, the evidence on behalf of the Respondents, which was accepted by the learned Judge, was that the laboratory had to be, and was, clean and reasonably free from dust. The Chemical Abstracts published in America in November, 1946, referred, however, to an article in the Journal of Industrial Hygiene of September, 1946, by Hardy and Tabershaw dealing, for the first time, with the discovery of a new disease of the delayed onset type—that which affected the Appellant, and then, in July, 1947, Dr. William's article to which I have referred, was published mentioning specifically beryllium oxide and Zinc beryllium silicate. As I have said, the significance of Dr. William's article only burst on the trade in this country at the end of 1947, which was after the Appellant had left the Respondents' employment.

I should add that neither before the trial Judge nor before this Court was any point taken by Counsel that these substances were dangerous *per se*. There seems little doubt that in the light of present day knowledge they are, and,

accordingly, that in regard to their use "the law exacts a degree of diligence so stringent as to amount to practically a guaranty of safety". See Lord Macmillan in *Donoghue* v. *Stevenson,* 1932 Appeal Cases, at page 612, approved by Lord Simonds in *Read* v. *Lyons,* 1947 Appeal Cases at page 182. The question, however, still remains as to whether the Respondents can be said to be in breach of that stringent duty when they did not know of the danger. The matter, as I have said, has not been argued before us but as at present advised I find it difficult to see how it could be contended that they should have done something—that is, make an exhaustive literature survey, take stringent precaution or warn—on the basis that the substances were dangerous *per se* when they had no reason to expect any danger. A person does not use an article dangerous *per se* at his peril. He is, however, under a specially stringent duty in regard to its use, but this duty arises in all the circumstances of the case, one of which is his knowledge. It is true that knowledge is not necessary when one is considering an occupier's liability in a *Rylands* v. *Fletcher* case. He is liable whether he knows or not that the article in question is likely to do damage if it escapes from his land c.f. *Rainham Chemical Works Limited* v. *Belvedere Fish Guano Company,* 1921, 2 Appeal Cases, page 465 at page 471, and *West.* v. *Bristol Tramways Company,* 1908, 2 King's Bench, at page 14. In such a case, however, the liability is absolute and does not depend on breach of duty. Nor, as at present advised, can any help be obtained from a consideration of the law applicable to animals. There, it is a defense that the animal in question belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief unless its keeper knows that the particular animal is likely to do mischief c.f. *Tilburn* v. *People's Palace & Aquarium Company,* 1890, 25 Queen's Bench Division, at page 258.

In other words, once a particular animal turns out to be dangerous the onus is on the defendant to show that it belonged to a class which the common experience of mankind had proved not to be dangerous and that he did not know it was dangerous. The law in regard to animals has, however, always formed a special and peculiar branch of its own. "Beasts have travelled in a compartment of their own", said Lord Simonds in *Read* v. *Lyons* vide supra at page 182. I do not think that any similar onus can be put on the Respondents in the present case.

Accordingly, in my judgment, this Appeal fails, and should be dismissed.

MR. RYDER RICHARDSON: I ask that the appeal be dismissed with costs. It is a Legal Aid case and in this case our clients do not ask for costs.

LORD JUSTICE DENNING: Very well.

MR. TRISTRAM BERESFORD: I have to apply, firstly, for taxation under the Legal Aid Act as between solicitor and client.

LORD JUSTICE DENNING: You may have that.

MR. TRISTRAM BERESFORD: Secondly, might we have leave from this Court to go to the House of Lords? As your Lordships readily appreciate, if we go there we have to go *in forma pauperis*, and if your Lordships thought right, whilst considering that matter, to grant leave, if we thought it worth-while pressing on when we have had an opportunity of considering your Lordships' judgment, it would save an application to the House of Lords.

LORD JUSTICE DENNING: What do you say, Mr. Ryder Richardson?

MR. RYDER RICHARDSON: It is entirely a matter for your Lordships to consider.

(Their Lordships conferred).

LORD JUSTICE DENNING: Yes, Mr. Beresford, you may have leave.

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FILED
FEB 20 1956
HAROLD B. WILLEY, C

In the Supreme Court of the United States

October Term, 1955

No. 644

SYLVANIA ELECTRIC PRODUCTS, INC.,
Petitioner, and Appellant below,

vs.

IRENE BARKER, Executrix,
Respondent, and Appellee below,

RESISTANCE TO ALLOWANCE OF CERTIORARI, BRIEF OF RESPONDENT

ROBERT D. NEELY,
304 Aquila Court,
Omaha 2, Nebraska.
Attorney for Respondent.

PETER E. MARCHETTI,
HARRY B. OTIS,
Omaha, Nebraska,
THOMAS L. MACKIN,
Boston, Massachusetts,
Of Counsel.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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In the
Supreme Court of the United States

October Term, 1955

No. 644

SYLVANIA ELECTRIC PRODUCTS, INC.,
Petitioner, and Appellant below,

vs.

IRENE BARKER, Executrix,
Respondent, and Appellee below,

RESISTANCE TO ALLOWANCE OF CERTIORARI, BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Does the petition present any valid considerations governing review on certiorari of the Circuit Court of Appeals in a diversity of citizenship tort case?

2. Does the exercise of sound judicial discretion warrant this Court in assuming jurisdiction of a diversity of citizenship case reflecting an entire lack of exculpatory evidence of defendant's negligence, where plaintiff below has made out a prima facie case and petitioner-defendant has failed completely to assume the burden of going forward with such exculpatory evidence, if any?

3. Did the District Court and the Circuit Court of Appeals improperly apply Nebraska Law in interpreting Nebraska Statutes of Limitations in a diversity of citizenship case where such statutes were pleaded by petitioner-defendant in the Court below?

4. Did the District Court in the trial court's charge to the jury and the Circuit Court of Appeals on appeal improperly apply the law of evidence concerning extrajudicial inconsistent statements made by a party in a proceeding against a different defendant in another state, where there was other competent evidence to the contrary to raise a jury question?

5. Should this Court grant certiorari to review the admission of the evidence of a qualified actuary of life expectancy of decedent where the trial Court charged the jury that such expert evidence might be rejected entirely by them?

STATEMEN

THE PROCEEDINGS IN THE DISTRICT COURT

The petition for Writ of Certiorari omits to state, as required by Rule 23 (g), that the basis for Federal Jurisdiction in the Court of first instance was diversity of citizenship, between plaintiff as a Nebraska citizen and the defendant, a Massachusetts Corporation, a citizen of Massachusetts, and that the amount in controversy in each case exceeded the sum of $3000.00.

Petitioner persists in this Court in setting forth as evidence facts which do not appear in the Joint Record Appendix, although its attention was pointedly directed to such inaccuracies in Appellee's brief before the Circuit Court of Appeals.

On page 3 of the petition the petitioner's assertion that Rexford L. Barker began blowing beryllium-coated tubing as early as 1931 is not reflected by the testimony. Neither petitioner's citation (JRA 66, 73, 81, 111), nor elsewhere in the record, is there testimony that the tubing blown by Barker contained beryllium before 1939 (JRA 73, 74, 110). Furthermore, Barker expressly denied working with coated tubing before 1941 (JRA 74) although in 1941 Barker himself coated the inside of plain glass tubes (JRA 77), there was no competent evidence that the fluorescent powders used for this purpose contained beryllium (JRA 77, 111).

It was not in 1944, as asserted by petitioner on page 4 of the petition, but in 1946 that Barker's employer bought and used petitioner's tubing (JRA 105, 119, 120). Four thousand to five thousand feet of this tubing were processed by Barker in the year 1946 (JRA 48). During this period he also blew tubing supplied by General Electric Company (JRA 119, 122). Petitioner omits to disclose as essential facts in the record that the coated fluorescent tubing used by Barker prior to 1944 was different from that supplied later (JRA 101, 102). The earlier coating adhered tightly to the glass and would not slough off during the bending process. The only sloughing apparent in tubing used prior to 1944 was that after it had burned awhile, it would come off in flakes but not as dust

(JRA 82, 93, 94, 102, 103). The tubing used after 1944, however, contained a powder or dust which would slough off upon being processed by Barker (JRA 82, 83, 94, 102), and became inhaled into his lungs (JRA 48, 49, 50, 155).

It was not until 1947 that Barker first noticed that his health might be affected (JRA 53, 181). Prior to that time he enjoyed good health (JRA 50, 124, 181). Except for one day when he had a cold, he never laid off of work from 1937 to 1947 (JRA 176, 181). Until 1947 he played golf every Saturday afternoon. He was a tournament golfer (JRA 51, 181). During the winter, the week end would be devoted to bowling (JRA 180). He played football and did push-ups with his son, and never complained of physical ailments (JRA 180). During 1945 in all kinds of weather he worked out of doors, repairing Neon signs, climbing up and down, and moving about heavy ladders to do so. During the year 1945, he was not bending any tubes (JRA 45, 50, 77, 180). It was not in the first interview with Dr. Dunn, but at a later time, when he and the doctor were digging out his history that he reported a tiredness in mowing his lawn (three lots in size) in 1943 (JRA 85, 164, 165, 177). His tiredness was not progressive from 1944 on (JRA 86).

During the first part of 1948, Barker consulted with Drs. Tipton and Offerman and finally with Dr. F. L. Dunn (JRA 53). He complained of loss of stamina and shortness of breath commencing in December of 1947 (JRA 53). Following July 27, 1948, when he first saw Barker, Dr. Dunn performed many tests in diagnosing Barker's disease. Within four to sixteen weeks (JRA 170), he had diagnosed Barker's condition as chronic lung disease due

to beryllium poisoning (JRA 141, 146). In part, this diagnosis was based on X-ray pictures taken of Barker's chest during the period from 1948 to 1952 (JRA 142, 143, 144, 145, 146). In part, the diagnosis was based on negative examinations eliminating tuberculosis and Boeck's sarcoid as effecting causes of illness (JRA 146). After Barker's death on September 12, 1952, Dr. Dunn supervised an autopsy of his body (JRA 150). A microscopic examination of sections of Barker's lung tissue revealed scar tissue and foreign body giant cells characteristic of beryllium poisoning (JRA 154). There was further revealed the presence in such cells of what, in the opinion of Dr. Dunn, were crystals of beryllium oxide (JRA 154). These were ascribed by him to be the cause of Barker's death (JRA 156).

The chemical analysis made in 1951 of one of petitioner's tubes furnished to Barker's employer in 1946 revealed that amount of beryllium oxide removed from the tube represented 2.41 per cent by weight of the powder contained in it (JRA 129).

The experience of the medical profession is that the median interval between inhalation of beryllium oxide into the lungs and the manifestation of severe symptoms is under two years (JRA 174).

Barker testified that before 1944 there was not the same exposure to loose powders in fluorescent tubes as there was after 1944, and that it was after 1944 that he first noticed that the powders would slough off (JRA 82, 83, 101, 102); that the first time that he ever heard the word "beryllium" was probably in October, 1948; that at no time was he informed by the petitioner of the nature

and content of the coating on the inside of fluorescent tubing bearing its trade-mark (JRA 61); that he did not know at any time what the chemical contents of the powders were; that although the powders would get on his lips after 1944, he did not know it was getting into his lungs (JRA 77, 95, 97).

The release executed by Barker in favor of General Electric Company in settlement of his claim against this supplier for the same disability claimed in the instant suit is limited in its terms to that company (Ex. C, JRA 281, 283). The release provided that Barker "hereby reserves all rights, claims and demands that he may have against other suppliers of material to Neon Products Company, and this contract and release is intended solely as a full settlement and adjustment of all claims of first party against second party." (JRA 282.) Like reservations are contained in the releases to General Electric executed by Irene Barker in her own behalf (Ex. D, JRA 203, 235), and as guardian for her son (Ex. E, JRA 286, 288).

Decedent Rex Barker earned, before his disability, approximately $6,000.00 a year. All but $12.00 or $15.00 per week were handed over to plaintiff, his wife, who paid all the bills of the family and saved the balance (JRA 179). Witness Boermeister, an actuary with the John Hancock Life Insurance Company for nearly 25 years, testified that in accordance with the United States census tables applicable to all persons in the United States, a man of Barker's age on September 12, 1952, would have a life expectancy of 28.1 years (JRA 133, 134). He further testified that it would take $19,089.00 at

3% interest to produce an income of $1,000.00 over 28.1 years, and $114,534.00 at 3% interest to produce an income of $6,000.00 over that period of time.

The facts concerning the verdicts returned by the jury and the disposition of the motions made by parties thereafter are stated by petitioner.

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THE PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

The proceedings in the Circuit Court of Appeals are set forth in the petition.

———o———

ARGUMENT

REASONS FOR DISALLOWING THE WRIT

I.

The Petition does not present any valid consideration governing a review on certiorari of the Circuit Court of Appeals decision in a negligence case.

A. The petition presents no important question of Federal Law not settled by this Court.

This Court has held several times that where lower Federal Courts are applying local law, the Supreme Court will not set aside their ruling except on a plain showing of error, and only in exceptional cases will the Supreme Court review the application of local law by lower Federal Courts.

D. Del Vechio v. Bowers, 296 U. S. 280, 285, 80 L. ed. 229, 232, 56 S. Ct. 190.

Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477.

District of Columbia v. Pace, 320 U. S. 698, 702, 88 L. ed. 408, 410, 64 S. Ct. 406.

Buxby v. Electric Utilities Employees Union, 323 U. S. 72, 89 L. ed. 78, 65 S. Ct. 142.

Petitioner does not contend that the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court; nor has it decided a Federal question in a way in conflict with applicable decisions of this Court.

The jurisdiction taken by the Federal Courts in these cases was solely by virtue of Section 1332 of Title 28, United States Code Annotated. The two actions respectively were for personal injuries, conscious pain and suffering and for death to respondent's decedent, a resident of Omaha, Nebraska, proximately caused by the negligence of the petitioner, a Massachusetts Corporation. The amount in controversy in each case exceeded $3000.00. It constitutes the only basis for Federal jurisdiction of these cases, although not set forth in the petition as required by Rule 23 (g) of the Rules of this Court.

B. The decision of the Circuit Court of Appeals is not in conflict with the decision of another court of appeals on the same matter.

Even if there were any conflict as to questions controlled by State law, conflict among Federal Circuit Courts of Appeals, that is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the State Courts.

Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860.

However, it must be emphasized that the petitioner does not contend that the decision of the Court of Appeals is in conflict with any decision of another Court of Appeals on the same matter.

C. There is no departure from the accepted and usual course of judicial proceedings by the lower court.

Petitioner has not contended that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervision. There is no contention that the cases were not fully, fairly and carefully tried (JRA 218) before the trial court and jury, nor is it contended that a full and impartial hearing was not allowed to all parties on appeal before the Circuit Court of Appeal.

II.

It is not the function of this Court in a diversity case to conform the law of one state to that of another or of the United States.

Petitioner appears to have devised a consideration or reason distinctly its own and not contemplated by Rule 19 of this Court, its prime reason being that the decision of the Circuit Court of Appeals "conflicts with the common law principles of negligence as a cause of action for personal injury in every common law state in the United States, and particularly in the United States District Courts heretofore applying such law."

Except for situations where the Constitution of the United States speaks to the contrary, this Court has adhered to the proposition that the law of each of the several states must stand as enunciated by its Courts and its Legislature even if in conflict with that of a sister state or of the United States.

Speaking for the Court in *Great Northern Ry. Co. v. Sunburst,* 287 U. S. 358, 77 L. ed. 360, Mr. Justice Cardozo said at pages 365 and 366:

> "The choice for any state may be determined by the juristic philosophy of the judies of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. * * * The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. * * * If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

Counsel apparently asks this Court to rely upon the case of *Lebourdais v. Vitrified Wheel Co.,* 194 Mass. 341, 80 N. E. 482, decided in 1907, cited and quoted by petitioner as authority for disregarding *Thornhill v. Carenter-Morton Co.* (1915), 220 Mass. 593, 108 N. E. 474; *Farley v. Tower* (1930), 271 Mass. 230, 171 N. E. 639, 86 A. L. R. 941, and *Carter v. Yardley & Co., Ltd.* (1946), 319 Mass. 92, 64 N. E. 2d 693, 164 A. L. R. 559, cited in the decision by the Circuit Court of Appeals in support of

the rule in Massachusetts that every manufacturer of an article or substance that he himself has made or compounded will be charged with notice of the quality and constitutents of that article and cannot excuse himself on the grounds that he did not know of its dangerous quality.

Petitioner's contention in the Courts below, and here, that there was no evidence that defendant knew or should have known of any danger inherent in beryllium cannot be sustained under the modern concept of a manufacturer's liability to an ultimate consumer as expressed in those cases following the rule announced in *MacPherson v. Buick Motor Company* (1916), 217 N. Y. 302, 111 N. E. 1050.

The unsound rationale of the 1907 Lebourdais decision, supra, cited by petitioner, was unmasked by Justice Cardozo in the *MacPherson* case, supra, wherein we find his much quoted, pungent observation on page 1053 of the Northeastern Report:

> "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

In 1946 Massachusetts gave sweeping acceptance to the doctrine of *MacPherson v. Buick Motor Co.*, supra, and expressly abandoned and threw into the discard the 1907 rule of *Lebourdais v. Vitrified Wheel Co.*, supra, in the following language from page 700 of 64 Northeastern 2nd as follows:

> "The time has come for us to recognize that the asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

Counsel now asks this Court to require the Circuit Court of Appeals to conform to the rule of negligence first found to be unsound in *MacPherson,* supra, and since abandoned by both Massachusetts and Nebraska.

Twenty-seven pages of Appendix C to the petition is devoted to a verbatim copy of *Harman v. Mitchan Works, Ltd.,* an as yet unreported English decision. This decision, in its entirety, was before the Circuit Court of Appeals, copied into petitioner's reply brief, and considered by that Court.

It discloses that by 1948 (two years after Rex Barker's exposure to beryllium in petitioner's lethal product (JRA 105, 119, 120)), the dangers of beryllium were discovered to be so great that it is no longer used and has been replaced by a different substance (Pet. App. c. 44-45). Accordingly, it is obvious that the cases at bar are perhaps among the last involving beryllium poisoning and there is consequently no factual question of any particular novelty or future importance involved.

This case also irrevocably refutes petitioner's argument that before 1946 there was no reason to suspect beryllium as a dangerous agent by reference to an American Article on "The Toxicology of Beryllium," published in the fall of 1943, in which it was said that a chemical pneumonia had been observed in three workmen employed in extraction of beryllium oxide (Pet. App. C-44). By

reference to the *Harman case,* supra, petitioner apparently seeks to pull itself up by its boot straps, having failed to introduce in the trial court any evidence either admitting or denying knowledge, or a reasonable opportunity to ascertain the inherent dangers of beryllium which it was releasing to the Neon sign industry, and respondent's decedent in particular.

In the light of *Erie R. Co. v. Thompkins,* 304 U. S. 64, 82 L. ed. 1188, followed by *Klaxon Company v. Stentor Electric Manufacturing Company, Inc.,* 313 U. S. 487, 85 L. ed. 1477; *Griffin v. McCoach,* 313 U. S. 498, 85 L. ed. 1481, and the plethora of decisions since Erie expanding the rule that in diversity cases the law of the State as declared by its Legislature or by decisions of its highest Courts is not a matter of Federal concern, the petitioner in effect now asks this Court to exhume the bones of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, and to coordinate them with the sinews and tendons of a Federal common law of petitioner's own choice and persuasion in the field of negligence and the conflict of laws.

III.

The trial court and the Circuit Court of Appeals properly applied Nebraska law in interpreting Nebraska Statutes of Limitations pleaded by petitioner-defendant.

The complaint in the personal injury action was filed on August 4, 1950 (JRA 1). A special interrogatory was submitted by the Court to the jury requesting them to ascertain on what date Barker knew, or should have known, that he was suffering from beryllium poisoning. The answer to this interrogatory was: December 1, 1948

(JRA 249); hence the action was commenced within two years of the time Barker knew or should have known he was suffering from beryllium poisoning.

The applicable Massachusetts Statute provided that the limitation for negligently caused personal injury is six years (Pet. App. B-38-39).

Section IX of the quoted Massachusetts Statute "borrows" the foreign state's statute where its limitation period is less than the six-year period of Massachusetts. In Nebraska the Statute of Limitations in tort actions is four years (Pet. App. B-36).

In referring to Sec. 25-207, R. R. S. Nebraska, 1943, petitioner on page 13 states the Nebraska statute limits a cause of action for negligence to four years "after the occurrence giving rise to it." No such language is included therein.

When the cause of action actually accrues and the statute of limitations commences to run must be determined from Nebraska case law.

The general rule in wide, if not universal, application as to "borrowing" statutes, is that in determining whether the action is barred at the forum, the statute of the sister state is to be given the effect which it would have in that state.

Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69, 1 S. Ct. 3.

Hilliard v. Pennsylvania R. Co. (CCA 6, 1935), 73 F. (2d) 473 (Cert. den. 294 U. S. 721, 79 L. ed. 1253, 55 S. Ct. 548).

Extensive annotations on this subject are found in 75 A. L. R. 203, and 149 A. L. R. 1224.

The petitioner cites no Massachusetts authority for the denial of the general rule in the cases at bar.

In cases of traumatic injury, where there is some apparent injury at the time of the trauma, generally speaking the cause of action immediately results, so that for limitation purposes the situation is simplified as to the time the action accrues. Such a situation logically differs from the mere exposure to a disease which may have a long, or comparatively long, latent period prior to the manifestation of any symptoms.

In *Urie v. Thompson,* 337 U. S. 163, 93 L. ed. 1283, 69 S. Ct. 1018, 11 A. L. R. 2d 252, this situation was faced squarely by this Court in a case involving a negligence action brought under the Federal Employers' Liability Act, wherein the Court held that the action was not barred by the statute of limitations since it was brought within three years from the date of discovery by the plaintiff of the disease. It is to be noted that in *Urie* the period of continuous exposure to silica dust encompassed some 28 years before Urie's condition was diagnosed and established as a silicosis.

The Supreme Court of Nebraska is in accord with the salutary and reasonable rule laid down in *Urie v. Thompson,* supra, and has repeatedly held that when a disease is latent and progressive, the statute of limitations is not made applicable until the person suffering therefrom acquires knowledge of the disability.

Thus, in *Keenan v. Consumers Public Power District* (1949), 152 Neb. 54, 40 N. W. 2d 261, where an employee suffered an injury, the character of which is ascertainable only by medical men, and medical men are unable to ascertain it up to a certain time, the statute of limitations does not begin to run until the injury is ascertained. To the same effect see *Dryden v. Omaha Steel Works,* 148 Neb. 1, 26 N. W. 2d 293.

In harmony with these expressions by the Nebraska Court, is the case of *Williams v. Elias,* 140 Neb. 656, 1 N. W. 2d 121, wherein the rule of *Capucci v. Barone,* 266 Mass. 578, 165 N. E. 653, was specifically rejected in concluding that a tort action for malpractice was not barred by a two-year limitation of Section 20-208, Comp. St. Supp. 1939 (now Section 25-208, R. R. S. Neb. 1943), if the action were commenced within two years from the time treatment ended.

This consistency of the approach of the Nebraska Supreme Court to the application of its statute of limitations leaves no doubt that if the instant case were presented to the Nebraska Supreme Court, the determination of that Court would be identical to that arrived at by the court below, based on the jury's answer to special interrogatory, to wit, that the personal injury action was commenced within two years from the time it was discovered.

IV.

Admissions contained in extra-judicial proceedings, where parties are not identical, are given only the force of admissions to be considered by the jury and are not conclusive upon the party making them.

Petitioner charges respondent's decedent with *"perjuring himself successfully to deceive and defraud one of two Courts for the purpose of obtaining money"* and then inquires whether plaintiff can *"by false statements under oath diametrically opposed in the two instances profit materially and financially therefrom in both courts?"* Respondent suggests that these charges are utterly untrue, absolutely without foundation, and that the insinuations and innuendo made against a decent, hard-working artisan, suffering and dying a horrible death, as a sacrifice on the altar of industrial development, are so scandalous in and of themselves as to deprive petitioner of any further consideration under Rule 40, paragraph 5 of this Court.

Respondent would not be surprised at such an ad hominem attack before a jury, but it is frankly astounded that it could be urged here as a reason for a review on certiorari.

The Court's attention is directed to the disposition made of this attack by the Circuit Court of Appeals (Pet. App. A. 22, 23, 24, 25). It is respectfully submitted that all of the answers respondent might make are there calmly and objectively set forth.

V.

There was no error in the admission of the actuary's testimony considered in the light of the trial court's charge to the jury.

Respondent is again confounded by the suggestion made by petitioner in Section 4 of its argument that because Barker was suffering from berylliosis sustained as the result of the negligence of the petitioner, the actuary's

testimony, admittedly based on statistics covering healthy individuals, was inadmissible since Barker was not healthy when he died and his life expectancy at death should not be allowed to be measured by such statistics.

None of the cases cited by petitioner hold to this theory, nor can respondent find any cases supporting such a rule.

Respondent concedes that had Barker been in less than perfect health by reason of causes other than beryllosis the actuary would have had to measure his life expectancy accordingly.

Before Barker contracted beryllosis, he enjoyed better than average health (JRA 50, 124, 181); from 1937 to 1947 he had lost but one day's work due to a cold (JRA 177, 181). He was a tournament golfer (JRA 51, 181) until he was exposed to petitioner's product in 1946. Throughout 1945 he worked outdoors doing heavy manual labor (JRA 45, 50, 77, 180).

Certainly but for the beryllosis contracted in using petitioner's product, Barker would normally have been expected to live out the expectancy based on healthy individuals.

The actuary also further testified as to the amount required at 3% interest to produce an income of $1,000 annually for Barker's life expectancy. The trial court fully and fairly charged the jury with respect to the actuary's testimony and cautioned them that they were not required to accept it but might reject the evidence entirely (JRA 229, 230).

CONCLUSION

Respondent respectfully submits that petitioner is not entitled to review on certiorari. No Federal question has been decided by the Circuit Court of Appeals; the decision is not in conflict with any decision of any other Circuit Court of Appeals; no important State question has been adjudicated by either Court below which in any wise is incompatible with the law of Massachusetts or Nebraska applicable to these cases; and there has been no unseemly departure from the accepted and usual course of judicial proceedings warranting supervision by this Court.

The Respondent therefore respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

ROBERT D. NEELY,

304 Aquila Court,
Omaha 2, Nebraska,

Attorney for Respondent.

PETER E. MARCHETTI,

1037 Omaha National Bank Bldg.,
Omaha, Nebraska,

HARRY B. OTIS,

304 Aquila Court,
Omaha 2, Nebraska,

THOMAS L. MACKIN,

40 Court Street,
Boston, Massachusetts,

Of Counsel.